28 Orig'l.

Supreme Court of the United States

WALTER PETERSON, as Receiver of the Interstate Coal Company,

vs.

ARTHUR SIDNEY DAVISON.

Petition and Papers on Application for Leave to File a Motion for a Writ of Prohibition and for a Writ of Mandamus.

INDEX

1

United States District Court

SOUTHERN DISTRICT OF NEW YORK.

WALTER PETERSON, as Receiver of the Interstate Coal Company, Inc.,

Plaintiff,

against

ARTHUR SIDNEY DAVISON,

Defendant.

2

TO THE SUPREME COURT OF THE UNITED STATES:

The petition of WALTER PETERSON, Receiver of the Interstate Coal Company, Inc., the above named plaintiff, respectfully shows to this Court:

That he is the Receiver of the Interstate Coal Company, Inc., and was duly appointed such by an order of the United States District Court made in an action in which the Susquehanna Coal Company was plaintiff and the Interstate Coal Company, Inc., defendant, brought to sequester property of the said defendant. Annexed hereto 3
in the copy of the complaint in this action is a copy of the order of such District Court appointing the plaintiff such Receiver.

This action is at common law and is ancillary to the above mentioned action of the Susquehanna Coal Company against the Interstate Coal Company, Inc. The amount claimed is upwards of $20,000, exclusive of interest. A copy of the summons and complaint in this action is hereto

annexed. A copy of the defendant's amended answer is hereto annexed from which it appears, among other things, that a counterclaim is alleged of $9,999.10. A copy of the plaintiff's reply denying the allegations of such counterclaim is hereto annexed.

On the demand of the plaintiff, the defendant served a bill of particulars of its claim set up in its answer by which it appears that the defendant practically admits the sale and delivery of the coal alleged in the complaint and all the payments alleged in the complaint, but claims more coal purchased and additional payments made both before and after the dates set out in the complaint.

The defendant herein made a motion for an order appointing an auditor "to make a preliminary investigation in order to simplify the issues involved, so that they might be more intelligently directed to the jury and directing him to hear the parties and any witnesses that may be produced and to make a report thereon to this Court, giving him power to employ a stenographer," and asking that the expenses of the auditor and the stenographer be divided between the parties. A copy of the papers upon which said motion was made is hereto annexed. Plaintiff opposed such motion upon the ground, among other things, that there was no power in the Court to order the matter referred to an auditor or referee, or to in any way deprive the plaintiff of his right to a trial by jury of all the issues in the action. The Court granted the motion of the defendant, and a copy of the opinion of the Judge rendered

on such motion is hereto annexed. The plaintiff 7
duly presented and the Judge allowed an exception to such decision, and the same was filed and a copy is hereto annexed. The Court made an order on its decision appointing Wallace Mcfarlane, Esq., auditor with powers and duties therein prescribed. A copy of the order is hereto annexed.

The cause had been on the Trial Calendar of the United States District Court for the Southern District of New York, and by agreement was reserved generally. Under this practice either party could move to restore it for trial on two 8
days' notice, and the plaintiff on November 28th, 1919, duly moved that the cause be restored to the Trial Calendar for trial. A copy of the notice of motion is annexed. Hon. Augustus N. Hand, United States District Judge presiding at such Trial Term, denied the motion and stayed the trial of this action until the report of the auditor appointed as before stated, came in. A copy of the order is annexed. The matter has been noticed for hearing and trial before the auditor, and defendant threatens to proceed before him. 9

Your petitioner is informed and believes that the order appointing the auditor is without any validity whatever; that the Court had no power to make such order; that petitioner cannot appeal from such order; that if the matter is heard before such auditor, it will be in violation of the rights of the plaintiff guaranteed to him by the Constitution of the United States; that because of the order of the District Court above referred

to, plaintiff is deprived of his right to present this case to a jury until after the termination of the proceeding before the auditor, and his report made; that there is no appeal permitted from either of said orders.

Petitioner asks leave to make a motion in this Court on a date to be fixed, for an order of this Court for a writ prohibiting said defendant and Wallace Mcfarlane from proceeding under said order of October 27th, 1919, and/or a Writ of Mandamus directed to the Hon. Augustus N. Hand or the United States District Judge for the Southern District of New York who may be at the time holding Trial Term of the United States District Court in said district, demanding him to restore this cause to the Trial Calendar, and that the same may be tried in the regular and usual way, or for such other and further relief as may be proper in the premises.

And your petitioner will ever pray, etc.

Dated, New York, December 30th, 1919.

WALTER PETERSON,
Petitioner.

KELLOGG & ROSE,
Attorneys for Petitioner,
Office and Post Office Address,
115 Broadway,
Borough of Manhattan,
New York City.
ABRAM J. ROSE and
A. L. WILLIAMS,
Of Counsel.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.: 13

WALTER PETERSON, being duly sworn, deposes and says, that he is the petitioner herein; that he has read the foregoing petition and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

WALTER PETERSON.

Sworn to before me this } 14
30th day of December, 1919. }
WM. H. O'BRIEN,
Notary Public,
Westchester County.
New York Co. Clerk's No. 2.
New York Co. Register's No. 10001.
My Commission Expires March 30th, 1920.

15

16 **Summons.**

UNITED STATES DISTRICT COURT.

SOUTHERN DISTRICT OF NEW YORK.

WALTER PETERSON, as Receiver of the Interstate Coal Company, Inc.,

Plaintiff,

against

ARTHUR SIDNEY DAVISON,

Defendant.

17

To the above-named Defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

18 Witness, the Hon. LEARNED HAND, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, this 30th day of October, in the year one thousand nine hundred and sixteen.

(SEAL.)

ALEX. GILCHRIST, JR.,
Clerk.

KELLOGG & ROSE,
Plaintiff's Attorney,
Office and Post Office Address,
115 Broadway,
Borough of Manhattan,
New York City.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER PETERSON, as Receiver of the Interstate Coal Company, Inc.,

Plaintiff,

against

ARTHUR SIDNEY DAVISON,

Defendant. 20

The complaint of the above named plaintiff respectfully shows to this Court upon information and belief:

I. That at all the times hereinafter mentioned the defendant was and now is doing business in the City and State of New York under the registered trade name of A. Sidney Davison Coal Co.

II. That heretofore and on the 7th day of August, 1916, in an action pending in this Court in which the Susquehanna Coal Company, a corporation duly organized under the laws of the State of Pennsylvania and a citizen of Pennsyl- 21
vania was plaintiff, and the Interstate Coal Company, Inc., a corporation organized under the laws of the State of New York and a citizen of the State of New York was defendant, an order or decree was duly made by this Court whereby the stock, property, real and personal, things in action and effects of said defendant corporation, the Interstate Coal Company, Inc., was sequestrated and by said order or decree Walter Peter-

son, the plaintiff above named was duly appointed the receiver of the property, choses in action and assets of the Interstate Coal Company, Inc. (a copy of said order is hereto annexed and made a part of this complaint). That on the 8th day of August, 1916, the said Walter Peterson duly qualified as such receiver and ever since has been and is now acting as such receiver; and the plaintiff brings this as an action ancillary to the said action of Susquehanna Coal Company against the Interstate Coal Company, Inc.

23

III. Plaintiff further shows on information and belief that between the 1st of April, 1915, and the 1st of February, 1916, the Interstate Coal Company, Inc., sold and delivered to the defendant doing business under the registered trade name of A. Sidney Davison Coal Co., large quantities of coal, and at his request laid out and expended large sums of money for advances to the carriers of the coal and other purposes. The dates upon which the coal was delivered, the kind and quantity of coal delivered, the barge or vessel by which it was delivered, and the agreed price or

24 value of the coal and the amount of the advances are all shown in the schedule hereto annexed marked Schedule "A," which is made a part of this complaint.

IV. Upon information and belief that the aggregate of the price and agreed value of the coal so sold and delivered and advances so made as aforesaid is the sum of Eighty-four thousand five hundred thirty-three and 86/100 dollars ($84,533.86).

25

V. Upon information and belief that from time to time the defendant paid to the Interstate Coal Company, Inc., certain sums of money and certain allowances and deductions were made on account of the amount due for coal and for advances as aforesaid, the amount so paid and allowances made being in the aggregate Sixty-three thousand five hundred nineteen and 43 100 dollars ($63,519.43). The dates upon which such payments and allowances were made and the amount of the respective payments and allowances are set forth in the schedule hereto annexed marked 26 Schedule "B."

VI. Upon information and belief that defendant has not paid the sum of Twenty-one thousand fourteen and 43/100 dollars ($21,014.43), the difference between the amounts due and paid as aforesaid, and there is now due and payable from the defendant to the plaintiff the said sum.

WHEREFORE, the plaintiff demands judgment against the defendant for the sum of TWENTY-ONE THOUSAND FOURTEEN AND 43/100 DOLLARS ($21,014.43), with interest from the first day of February, 1916, besides the costs and disbursements of this action. 27

KELLOGG & ROSE,
Attorneys for Plaintiff,
Office and Post Office Address,
No. 115 Broadway,
Borough of Manhattan,
City of New York.

28 *Complaint.*

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

SUSQUEHANNA COAL COMPANY, *Complainant,* *against* INTERSTATE COAL COMPANY, INC., ***Defendant.***	In Equity E—13-325.

29

Now, on this 7th day of August, 1916, this cause came on to be heard, the defendant being in default for want of an appearance, plea or answer, and after hearing Abram J. Rose, of counsel for complainant, and after due deliberation, it is ordered, adjudged and decreed as follows, viz.:

(1) That the stock, property, real and personal, things in action and effects of the said defendant corporation, the Interstate Coal Company, Inc., be and the same hereby are sequestrated and vested in the Receiver hereby ap-
30 pointed, and the said defendant is hereby directed to execute a good and sufficient conveyance thereof to said Receiver.

And it appearing from the pleadings herein that heretofore and on or about the 27th day of April, 1916, an order was made by this Court in an action of the Susquehanna Coal Company against the Interstate Coal Company, Inc., whereby Walter Peterson was appointed Receiver of the goods, properties and chattels of this defend-

ant; that he qualified and gave bond as such Receiver, and is now acting as such Receiver, it is hereby

ADJUDGED AND ORDERED, (2) that the appointment of said Walter Peterson under the order of April 27th, 1916, be and the same hereby is vacated and set aside, and the said Walter Peterson is directed to turn over to the Receiver herein appointed all the goods, chattels and properties of this defendant received by him, or in his hands, and to render an account of his proceedings as Receiver under said order to the Receiver herein appointed, together with a statement of any claim that he may have for the expense or debts incurred by him in the performance of the duties of such office. 32

IT IS FURTHER ADJUDGED, (3) that Walter Peterson be and he hereby is appointed as permanent Receiver of the said defendant corporation with the usual powers and duties, and vested with all the rights and powers of Receivers in like cases.

IT IS FURTHER ORDERED, (4) that the said defendant Interstate Coal Company, Inc., and each and every of its officers, agents, directors, employees, servants or attorneys, be and they hereby are and each of them is hereby required and commanded forthwith to transfer, convey, turn over and deliver to the Receiver, or his duly constituted agents or representatives, all the real and personal property, business, assets and effects above described or referred to, and all the property and assets of the defendant company, books of account, deeds, leases, contracts, bills, notes, accounts, 33

moneys, shares of stock, bonds or obligations, or other property of the defendant Interstate Coal Company, Inc., in his, their or its hands, or subject to his, their or its control or order, and said Receiver is hereby directed and empowered to collect and receive the debts, demands and other property of the said corporation and to preserve the property and proceeds of the debts and demands collected, to sell or otherwise dispose of the property as directed by the Court, to collect, receive and preserve the proceeds thereof, and
35 to maintain any action or special proceeding for either of those purposes.

IT IS FURTHER ORDERED, (5) that the defendant Interstate Coal Company, Inc., its officers, agents, servants, employees or attorneys, be and they are hereby enjoined and restrained from selling, assigning, transferring or disposing of any money, assets, properties or things of value belonging to the defendant Interstate Coal Company, Inc., or from taking the possession of or in any way interfering with any part thereof, or from in any manner obstructing or interfering with the
36 possession or management of any part of said property over which the receiver is hereby appointed, or doing any act or thing to prevent the discharge by the said receiver of his duties, or from in any way receiving any moneys or collecting any accounts due and owing to the said defendant Interstate Coal Company, Inc.

IT IS FURTHER ORDERED, (6) that said receiver is hereby directed to procure and publish an order requiring all the creditors of the said Inter-

state Coal Company, defendant, to exhibit and prove their claims to said Receiver at a place to be specified in said notice, and become parties to the above entitled suit or proceeding within six months from the first publication of the notice of the order, and that all and every of the said creditors who make default in so doing shall be precluded from all benefit of this judgment and from any distribution which shall be made under this judgment.

IT IS FURTHER ORDERED, (7) that the said Receiver make a fair and just distribution of the said property of the said Interstate Coal Company and of the proceeds thereof among its fair and honest creditors who have exhibited and proved their claims in the order and in the proportion prescribed by law as in the case of a voluntary dissolution of a corporation. 38

IT IS FURTHER ORDERED, (8) that before distributing any part of said funds or assets, and within six months from the entry of this judgment, the said Receiver report to this Court his proceedings under this order, with an exhibit of the accounts and demands for and against said Interstate Coal Company, and all its open and subsisting contracts, and a statement of the amount of money and assets in the hands of said Receiver, together with a statement of his expenses and commissions; to the end that such order may be made in regard thereto as the nature of the case may require; and that until the coming in of said report, and the hearing thereon, the question as to the distribution of said assets and moneys, and of the rights and interests of the respective par- 39

40 *Complaint.*

ties claiming the same, or any portion thereof, and other questions not herein disposed of, including the question of costs, be reserved for further directions.

IT IS FURTHER ORDERED, (9) that the said Receiver before entering upon the discharge of his duties, file with the Clerk of this Court a proper bond or surety to be approved by a Judge of this Court, in the sum of Twenty-five Thousand Dollars, conditioned for the faithful discharge
41 of his duties, and that he will promptly account for all property and funds coming into his hands according to the order of the Court.

JULIUS M. MAYER,
D. J.

42

64 *Complaint.*

STATE OF NEW YORK, }
County of New York, } ss.:

WALTER PETERSON, being duly sworn, says that he is the plaintiff in this action. That he has read the foregoing complaint and that the same is true to his own knowledge, except as to the matters which are therein stated to be alleged upon information and belief, and that as to those matters, he believes it to be true.

WALTER PETERSON.

65

Sworn to before me this 27th day of October, 1916.

WM H. O'BRIEN,
(Seal.) Notary Public,
Westchester County.
New York Co. Clerk's No. 12
New York Co. Register's No. 8022.

66

Schedule A.

A. S. DAVISON COAL CO.

Debtor to

THE INTERSTATE COAL CO., INC.

WALTER PETERSON
RECEIVER
THE INTERSTATE COAL CO. INC.
October 21, 1916.

Detail Statement of Account

DEBIT

Date.	*Boat.*	*Tonnage.*	*Kind.*	*Price.*		*Total.*
Apr. 12, 1915	"Capt. Thos. Sheridan"	453	Pea	$2.90 Alg.		$ 1,313.70
Apr. 7, 1915	"Dora Farrell"	285	#3 Buck.	1.40 Fob.	399.00	
				Towing,	15.55	
				Trimming,	8.55	
						423.10
Apr. 16, 1915	"Dora Farrell"	893	#3 Buck.	1.45 Fob.	1,294.85	
				Towing,	33.79	
				Trimming,	26.79	
						1,353.43
May 1, 1915	"I. Kellars"	8	Egg	4.90 Fob.	39.20	
				Trimming,	.24	
						39.44
May 1, 1915	"Dora Farrell"	894	#3 Buck.	1.45 Fob.	1,296.30	
				Towing,	33.82	
				Trimming,	26.82	
						1,356.94
May 11, 1915	"A. J. Snyder"	127	Buck.	2.40 Fob.	304.80	
				Towing,	14.81	
				Trimming,	3.81	
						323.42
May 18, 1915	"Dora Farrell"	544	Pea	3.40 Fob.	1,849.60	
				Towing,	23.32	
				Trimming,	16.32	
						1,889.24
May 14, 1915	"Frank Farrell"	431	Pea	3.40 Fob.	1,465.40	
				Towing,	19.93	
				Trimming,	12.93	
						1,498.26
May 28, 1915	"Burns Bros. #8"	398	#1 Buck	2.40 Fob.	930.40	
				Towing,	18.88	
				Trimming,	11.88	
						981.16
June 28, 1915	"Foley"	386	#1 Buck.	2.30 Fob.	887.80	
				Towing,	18.58	
				Trimming,	11.58	
						917.96
June 26, 1915	"Dora Farrell"	693–17	Pea	3.00 Fob.	2,081.55	
				Towing,	27.82	
				Trimming,	20.82	
						2,130.19
July 6, 1915	"Nora Farrell"	359	#3 Buck.	1.35 Fob.	484.65	
				Towing,	17.77	
				Trimming,	10.77	
						513.19
July 8, 1915	"Ida"	490	Buck.	2.35 Alg.		1,151.50
Amount forwarded,						$13,893.53

Schedule A.

Amount brought forward,							$13,893.53
July 19, 1915	"Derry"	407		Buck.	$2.47 Alg.		1,005.29
July 14, 1915	"Thos. Hale"	469		Buck.	2.25 Alg.		1,055.25
July 20, 1915	"R. N. Gordon"	621	#3	Buck.	1.40 Fob.	869.40	
				Towing,		25.63	
				Trimming,		18.63	
							913.66
July 26, 1915	"T.A.Q."	234		Buck.	2.10 Fob.	491.40	
				Towing,		14.02	
				Trimming,		7.02	
							512.44
July 26, 1915	"John F. Foley"	302	#3	Buck.	1.35 Fob.	407.70	
				Trimming,		9.06	
							416.76
July 26, 1915	"Nora Farrell"	88		Stove	5.00 Fob.	440.00	
				Towing,		10.00	
				Trimming,		2.64	
							452.64
July 24, 1915	"Irwin"	344		Buck.	2.20 Alg.		756.80
Aug. 6, 1915	"Nora Farrell"	195	#1	Buck.	2.20 Fob.	429.00	
		195	#3	Buck.	1.40 Fob.	273.00	
				Towing,		18.70	
				Trimming,		11.70	
							732.40
Aug. 7, 1915	"Dora Farrell"	873	#3	Buck.	1.40 Fob.	1,222.20	
				Towing,		33.19	
				Trimming,		26.19	
							1,281.58
Aug. 16, 1915	"W. J. Lynch"	542		Buck.	2.30 Fob.	1,246.60	
				Towing,		23.26	
				Trimming,		16.26	
							1,286.12
July 10, 1915	"Smedley"	321		Buck.	2.20 Alg.		706.20
July 16, 1915	"Wilkinson"	377		Buck.	2.20 Alg.		829.40
Aug. 17, 1915	"Nellie O'Boyle"	146	#1	Buck.	2.05 Fob.	299.30	
				Trimming,		4.38	
							303.68
Aug. 18, 1915	"Phillip Rafferty"	529		Buck.	2.25 Alg.		1,190.25
Aug. 19, 1915	"Hattie"	446		Buck.	2.20 Alg.		981.20
Aug. 19, 1915	"Mifflin"	476		Buck.	2.20 Alg.		1,047.20
Aug. 25, 1915	"Thos. Hale"	461		Buck.	2.25 Alg.		1,037.25
Aug. 14, 1915	"John J. Cain"	323	#3	Buck.	1.35 Fob.	706.05	
				Towing,		30.19	
				Trimming,		15.69	
							751.93
Aug. 21, 1915	"Annie Gannon"	543		Buck.	2.25 Alg.		1,221.75
Aug. 21, 1915	"George Conway"	534		Buck.	2.05 Fob.	1,094.70	
				Trimming,		16.02	
							1,110.72
Amount forwarded,							$31,486.05

Schedule A.

Amount brought forward,						$31,486.05
Aug. 25, 1915	"Irwin"	456	#1 Buck.	$2.25 Alg.		1,026.00
Aug. 26, 1915	"Dora Farrell"	891	#3 Buck.	1.35 Fob.	1,202.85	
				Towing,	33.73	
				Trimming,	26.73	
						1,263.31
Aug. 16, 1915	"Frazer"	382-14	#3 Buck.	1.35 Fob.	516.65	
				Towing,	18.49	
				Trimming,	11.49	
						546.63
Aug. 28, 1915	"T.A.Q."	262	Buck.	2.10 Fob.	550.20	
				Towing,	14.86	
				Trimming,	7.86	
						572.92
Sept. 1, 1915	"William Farrell"	492-02	Pea	3.00 Fob.	1,476.30	
				Towing,	21.76	
				Trimming,	14.76	
						1,512.82
Sept. 1, 1915	"Westfield"	192	Buck.	2.10 Fob.	403.20	
				Trimming,	5.76	
						408.96
Sept. 1, 1915	"Frank L. Tague"	248	Buck.	2.30 Fob.	570.40	
				Trimming,	7.44	
						577.84
Sept. 2, 1915	"Morris Woods"	729	Buck.	2.25 Alg.		1,640.25
Sept. 4, 1915	"Harry Parks"	381	Chestnut	5.15 Alg.		2,092.15
Sept. 11, 1915	"Derry"	378	#1 Buck.	2.25 Alg.		850.50
Sept. 11, 1915	"Five Brothers"	101	#2 Buck.	1.70 Fob.	171.70	
		119	#3 Buck.	1.35 Fob.	160.65	
				Trimming,	6.60	
						338.95
Sept. 11, 1915	"U. S. Wiltsie"	201	#3 Buck.	1.35 Fob.	271.35	
				Towing,	14.38	
				Trimming,	6.03	
						291.76
Sept. 9, 1915	"C. L. Tague"	453	#3 Buck.	1.35 Fob.	625.03	
				Towing,	27.91	
				Trimming,	13.89	
						666.85
Sept. 9, 1915	"J. S. Doherty"	483	Buck.	2.25 Alg.		1,086.75
Sept. 10, 1915	"T. F. Farrell"	82	Pea	3.00 Fob.	246.00	
		198	Buck.	2.20 Fob.	435.60	
		136	#3 Buck.	1.35 Fob.	183.60	
				Towing,	19.48	
				Trimming,	12.48	
						897.16
Sept. 10, 1915	"T.A.Q."	235	Buck.	2.30 Fob.	540.50	
				Towing,	14.05	
				Trimming,	7.05	
						561.60
Amount forwarded,						$46,720.50

Schedule A.

Amount brought forward,						$46,720.50
Sept. 14, 1915	"M. R. Farrell"	506	#3 Buck.	1.35 Fob.	683.10	
				Towing,	22.18	
				Trimming,	15.18	
						720.46
Sept. 14, 1915	"Phillip"	365	Buck.	2.20 Fob.	839.50	
				Towing,	25.09	
				Trimming,	10.95	
						875.54
Sept. 15, 1915	"Dora Farrell"	899	#3 Buck.	1.35 Fob.	1,213.65	
				Towing,	33.97	
				Trimming,	26.97	
						1,274.59
Sept. 15, 1915	"Philip Feeney"	539	#3 Buck.	1.35 Fob.	727.65	
				Towing,	28.54	
				Trimming,	16.17	
						772.36
Sept. 20, 1915	"Oliver Costello"	351	#1 Buck.	2.35 Fob.	824.87	
				Towing,	17.53	
				Trimming,	10.53	
						852.91
Sept. 20, 1915	"Tyrone"	336	Buck.	2.35 Fob.	789.60	
				Towing,	17.08	
				Trimming,	10.08	
						816.76
Sept. 23, 1915	"Nomad"	511	#3 Buck.	1.35 Fob.	689.85	
				Towing,	22.33	
				Trimming,	15.33	
						727.51
Sept. 1, 1915	"M. R. Farrell"	500–15	Pea	3.25 Fob.	1,627.44	
				Towing,	22.03	
				Trimming,	15.03	
						1,664.50
Aug. 23, 1915	"Cresson"	450	Chestnut	5.65 Alg.	2,542.50	
			Allowance for poor quality			
				$1.35 per ton,	607.50	
						1,935.00
Aug. 23, 1915	"Emblem"	313	Chestnut	5.55 Alg.	1,737.15	
			Allowance for poor quality			
				$1.80 per ton,	563.40	
						1,173.75
Aug. 16, 1915	"C. Reardon"	281	Chestnut	5.30 Alg.	1,489.30	
			Allowance for poor quality			
				$1.80 per ton,	505.80	
						983.50
Sept. 20, 1915	"Bunny"	239	#2 Buck.	1.80 Alg.		430.20
Sept. 30, 1915	"A. McClellan"	229	#3 Buck.	1.40 Fob.	320.60	
				Towing,	13.87	
				Trimming,	6.87	
						341.34
Sept. 30, 1915	"Bunny"	52	#2 Buck.	1.80 Alg.		93.60
Sept. 30, 1915	"Derry"	314–11	Pea	3.00 Fob.	943.65	
				Towing,	16.45	
				Trimming,	9.45	
						969.55
Amount forwarded,						$60,352.07

Schedule A.

Amount brought forward,								$60,352.07
Oct.	2, 1915	"Nora Farrell"	278-12		Pea	3.00 Fob.	835.80	
						Towing,	15.37	
						Trimming,	8.37	
								859.54
Oct.	1, 1915	"Clermont"	463		#3 Buck.	1.40 Fob.	648.20	
						Towing,	20.89	
						Trimming,	13.89	
								682.98
Oct.	4, 1915	"Morris Woods"	521		Buck.	2.30 Fob.	1,198.30	
						Towing,	22.63	
						Trimming,	15.63	
								1,236.56
Oct.	5, 1915	"Dora Farrell"	913		#3 Buck.	1.35 Fob.	1,232.55	
						Towing,	34.39	
						Trimming,	27.39	
								1,294.33
Oct.	26, 1915	"Mary Costello"	248		#1 Buck.	2.30 Fob.	570.40	
						Towing,	14.44	
						Trimming,	7.44	
								592.28
Oct.	27, 1915	"M. G. Geer"	509		#3 Buck.	1.35 Fob.	687.15	
						Towing,	22.27	
						Trimming,	15.27	
								724.69
Oct.	9, 1915	"Bird"	202		Buck.	2.30 Fob.	464.60	
						Towing,	13.06	
						Trimming,	6.06	
								483.72
Oct.	14, 1915	"Mary V. Costello"	97		#1 Buck.	2.30 Fob.	225.10	
						Towing,	2.76	
						Trimming,	2.91	
								228.77
Oct.	16, 1915	"Mason & Quigley"	233		#3 Buck.	1.35 Fob.	314.55	
						Towing,	15.37	
						Trimming,	6.99	
								336.91
Oct.	18, 1915	"Charles O"	499		#3 Buck.	1.35 Fob.	673.65	
						Trimming,	14.97	
								688.62
Oct.	21, 1915	"M. R. Farrell"	542		#3 Buck.	1.35 Fob.	731.70	
						Towing,	23.26	
						Trimming,	16.26	
								771.22
Oct.	29, 1915	"Maurice Woods"	413		Buck.	2.30 Fob.	949.90	
						Towing,	27.43	
						Trimming,	12.39	
								989.72
Oct.	20, 1915	"Nora Farrell"	400		Pea	3.00 Fob.	1,200.00	
						Towing,	19.00	
						Trimming,	12.00	
								1,231.00
Nov.	2, 1915	"Dora Farrell"	849		#3 Buck.	1.35 Fob.	1,146.15	
						Towing,	32.47	
						Trimming,	25.47	
								1,204.09
Amount forwarded,								$71,676.50

Schedule A.

Amount brought forward,							$71,676.50
Nov. 10, 1915	"J. F. Foley"	337		Buck. $2.30 Fob.	775.10		
				Towing,	17.11		
				Trimming,	10.11		
						802.32	
Nov. 15, 1915	"Maurice Woods"	336		Buck. 2.20 Fob.	739.20		
				Towing,	19.06		
				Trimming,	10.08		
						768.34	
Nov. 15, 1915	"William"	451	#3	Buck. 1.35 Fob.	608.85		
				Towing,	20.53		
				Trimming,	13.53		
						642.91	
Nov. 22, 1915	"Egbert"	346	#1	Buck. 2.35 Fob.	813.10		
				Towing,	30.73		
				Trimming,	10.38		
						854.21	
Nov. 18, 1915	"L. W. Francis"	342–03	#1	Buck. 2.20 Fob.	752.73		
				Towing,	17.26		
				Trimming,	10.26		
						780.25	
Nov. 3, 1915	"Maurice Woods"	590–01		Buck. 2.30 Fob.			1,357.12
Dec. 3, 1915	"Monroe"	55		Broken 4.50 Fob.	247.50		
				Trimming,	1.65		
						249.15	
Dec. 6, 1915	"William Farrell"	200	#1	Buck. 2.30 Fob.	460.00		
		148	#2	Buck. 1.85 Fob.	273.80		
		149	#3	Buck. 1.35 Fob.	201.15		
				Towing,	21.91		
				Trimming,	14.91		
						971.77	
Dec. 9, 1915	"Nora Farrell"	411	#3	Buck. 1.35 Fob.	554.85		
				Towing,	19.33		
				Trimming,	12.33		
						586.51	
Dec. 17, 1915	"Hercules"	501	#3	Buck. 1.40 Fob.	701.40		
				Towing,	22.03		
				Trimming,	15.03		
						738.46	
Dec. 18, 1915	"William Farrell"	196	#3	Buck. 1.35 Fob.	264.60		
				Towing,	21.70		
				Trimming,	5.88		
						292.18	
Dec. 23, 1915	"Mary E."	228	#3	Buck. 1.65 Fob.	376.20		
				Towing,	14.74		
				Trimming,	6.84		
						397.78	
Dec. 2, 1915	"Burns Bros. # 7"	297–04		Pea 3.40 Fob.	1,010.48		
				Towing,	15.91		
				Trimming,	8.91		
						1,035.30	
Dec. 9, 1915	"Robert C. Newcomb"	210–16	#1	Buck. 2.20 Fob.	463.76		
				Towing,	13.33		
				Trimming,	6.33		
						483.42	
Amount forwarded,							$81,636.22

Schedule A.

Amount brought forward,						$81,636.22
Dec. 18, 1915	"Annie L. Ward"	286–11	#1 Buck.	$2.35 Fob.		673.39
Mar. 3, 1916	"Glen Island"	620	#3 Buck.	2.00 Fob.	1,240.00	
				Advances,	57.43	
						1,297.43
Aug. 25, 1915	"Mary V. Costello"	407	#1 Buck.	2.20 Fob.	895.40	
				Towing,	19.21	
				Trimming,	12.21	
						926.82
						$84,533.86

Schedule B.

CREDIT

Date.		*Amount.*	*Deductions.*	*Total.*	
June 1, 1915	Cash	$ 925.66	$	$ 925.66	
June 1, "	"	296.27	.....	296.27	
June 7, "	"	894.56	.....	894.56	
June 7, "	"	37.04	.....	37.04	
July 15, "	"	285.32	.....	285.32	
July 15, "	"	1,374.39	.....	1,374.39	
July 15, "	"	980.68	.....	980.68	
July 15, "	"	830.85	.....	830.85	
Aug. 27, "	"	643.02	.....	643.02	
Sept. 4, "	"	2,000.00	.....	2,000.00	
Sep. 7, "	"	2,000.00	.....	2,000.00	
Sep. 11, "	"	2,000.00	.....	2,000.00	
Sep. 14, "	"	1,140.08	.....	1,140.08	
Sep. 18, "	"	1,000.00	.....	1,000.00	
Sep. 22, "	"	116.26	187.42	303.68	
Sep. 22, "	"	281.71	10.05	291.76	
Sep. 22, "	"	327.95	11.00	338.95	
Sep. 24, "	"	1,470.23	.....	1,470.23	
Sep. 24, "	"	935.40	.....	955.40	
Sep. 24, "	"	1,142.45	.....	1,142.45	
Sep. 27, "	"	1,000.00	.....	1,000.00	
Sep. 27, "	"	890.00	.....	890.00	
Sep. 30, "	"	1,000.00	.....	1,000.00	
Oct. 2, "	"	1,514.27	150.23	1,664.50	
Oct. 4, "	"	2,500.00	.....	2,500.00	
Oct. 5, "	"	2,000.00	.....	2,000.00	
Amount forwarded,		$27,606.14	$ 358.70	$27,964.84	$84,533.86

Schedule B.

Amount brought forward,			$27,606.14	358.70	$27,964.84	$84,533.86
Oct.	6, 1915,	Cash	701.96	25.55	727.51	
Oct.	14, "	"	1,134.93	.....	1,134.93	
Oct.	14, "	"	1,800.00	.....	1,800.00	
Oct.	14, "	"	886.12	40.70	926.82	
Oct.	20, "	"	2,934.05	58.10	2,992.15	
Oct.	23, "	"	1,000.00	.....	1,000.00	
Oct.	25, "	"	2,697.79	.....	2,697.79	
Nov.	1, "	"	2,000.00	.....	2,000.00	
Nov.	9, "	"	1,244.40	1,297.82	2,542.22	
Nov.	10, "	"	3,369.76	.....	3,369.76	
Nov.	12, "	"	2,500.00	.....	2,500.00	
Nov.	13, "	"	2,000.00	.....	2,000.00	
Nov.	16, "	"	1,000.00	.....	1,000.00	
Nov.	27, "	"	3,000.00	.....	3,000.00	
Nov.	30, "	"	1,000.00	.....	1,000.00	
Dec.	1, "	"	1,000.00	.....	1,000.00	
Dec.	1, "	"	820.11	.....	820.11	
Dec.	11, "	"	126.71	102.06	228.77	
Dec.	11, "	"	346.67	245.61	592.28	
Dec.	11, "	"	420.69	157.15	577.84	
Dec.	22, "	"	325.26	11.65	336.91	
Dec.	27, "	"	700.00	.....	700.00	
Jan.	7, 1916	"	1,300.00	.....	1,300.00	

Dec.	27,	"	"	700.00	.....	700.00	
Jan.	7,	1916	"	1,300.00	.....	1,300.00	
Feb.	29,	"	Invoice of A. S. Davison for coal,	1,307.50	.....	1,307.50	
				$61,222.09	$2,297.34	$63,519.43	63,519.43
					Balance,		$21,014.43

Amended Answer. 67

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER PETERSON, as Receiver of the Interstate Coal Company, Inc.,

Plaintiff,

against

ARTHUR SIDNEY DAVISON,

Defendant.

Amended Answer.

68

The defendant herein, by Zabriskie, Murray, Sage & Kerr, his attorneys answers the complaint of the plaintiff as follows:

I. He admits the allegations contained in Paragraph I of the complaint.

II. Upon information and belief, he admits the allegations contained in Paragraph II of the complaint.

III. He denies each and every allegation contained in Paragraph III of the complaint, except that he admits that between April 1, 1915, and February 1, 1916, and also thereafter, the Interstate Coal Company, Inc., delivered certain coal to the plaintiff, and paid certain sums for the towing and trimming thereof, but denies that the statement annexed to the complaint referred to as Schedule A is a correct statement of the matters therein referred to. 69

IV. He denies each and every allegation contained in Paragraph IV of the complaint.

70 *Amended Answer.*

V. He denies each and every allegation contained in Paragraph V of the complaint, except that he admits that he made certain payments to the Interstate Coal Company, Inc., and that certain allowances and deductions were made by said company, but denies that the statement annexed to the complaint referred to as Schedule B is a full and complete statement of all payments made by him and of all allowances and deductions to which he was and is entitled.

71 VI. He denies each and every allegation contained in Paragraph VI of the complaint.

FOR A FIRST, SEPARATE AND INDEPENDENT DEFENSE, THE DEFENDANT ALLEGES AS FOLLOWS:

I. That by the terms of the contract under which all of the coal alleged to have been sold and delivered by the Interstate Coal Company, Inc., to defendant under Paragraph III of the complaint, as well as all other coal sold by the Interstate Coal Company, Inc., to defendant between April 1, 1915, and February 18, 1916, was sold, the Interstate Coal Company, Inc., war-
72 ranted to the defendant that all the coal delivered thereunder should conform to the specifications, and analyze according to the requirements, of the City of New York, and that in case any coal so delivered should not conform to such specifications and analyses, the defendant might deduct from the price thereof certain percentages of the said price, according to the degree in which such coal was found to differ upon analysis from such city requirements.

73

II. That during the period aforesaid the Interstate Coal Company, Inc., delivered coal to the defendant, in pursuance of said contracts, and billed the same to the defendant at a total price of $113,512.68.

III. That a large portion of the coal so delivered by the Interstate Coal Company, Inc., to the defendant failed to comply with the said city requirements, and the deductions to which the defendant was entitled under the terms of the aforesaid contracts, and also, by reason of charges for 74
freight and demurrage which the defendant was obliged to pay for account of the Interstate Coal Company, Inc., and for commissions agreed upon to be allowed to the defendant by the Interstate Coal Company, Inc., amounted to $23,264.38.

IV. That from time to time, settlements were had between the Interstate Coal Company, Inc., and the defendant, upon which it was determined that the total amount of said deductions was $23,264.38.

V. That, from time to time, the defendant made payments to the Interstate Coal Company, Inc., 75
for coal delivered under the aforesaid contracts, amounting in the aggregate to the sum of $88,769.78.

FOR A SECOND, SEPARATE AND INDEPENDENT DEFENSE, AND BY WAY OF COUNTERCLAIM, THE DEFENDANT ALLEGES:

I. That at all the times hereinafter mentioned the defendant was and now is doing business in the City and State of New York under the registered trade name of A. Sidney Davison Coal Co.

76 *Amended Answer.*

II. Upon information and belief, that heretofore and on the 7th day of August, 1916, in an action pending in this Court in which the Susquehanna Coal Company, a corporation duly organized under the laws of the State of Pennsylvania and a citizen of Pennsylvania was plaintiff, and the Interstate Coal Company, Inc., a corporation organized under the laws of the State of New York and a citizen of the State of New York was defendant, an order or decree was duly made by this Court whereby the stock, property, real and
77 personal, things in action and effects of said defendant corporation, the Interstate Coal Company, Inc., was sequestrated and by said order or decree Walter Peterson, the plaintiff above named, was duly appointed the receiver of the property, choses in action and assets of the Interstate Coal Company, Inc. That on the 8th day of August, 1916, the said Walter Peterson duly qualified as such receiver and ever since has been and is now acting as such receiver; and that the plaintiff brings this as an action ancillary to the said action of Susquehanna Coal Company against
78 the Interstate Coal Company, Inc.

III. That on or about June 21, 1915, the defendant and the A. H. Dollard Coal Sales Company entered into three certain contracts for the sale by said A. H. Dollard Coal Sales Company, and the purchase by the defendant of coal under the following terms and conditions, respectively:

Consignee	*Quantity*	*Price*
No. 160. William Farrell & Son	2300 tons Pea	$2.90 per ton f.o.b.
No. 162. William Farrell & Son and Burns Bros.	4000 tons No. 1 Buckwheat	2.10 " " "
No. 163. William Farrell & Son	11000 tons No. 3 Buckwheat	1.25 " " "

82 *Amended Answer.*

By the said contract, it was provided that the coal delivered thereunder should conform to the specifications and analyze according to the requirements of the City of New York, The A. H. Dollard Coal Sales Company well knew, and so the fact was, that this defendant entered into the said contract and agreed to purchase the coal therein specified with the intention and for the purpose of reselling it to the consignees therein named, William Farrell & Son, and Burns Bros. at a profit, in order to enable them to sell it to
83 the City of New York at a profit, for delivery to certain hospitals of said City, in accordance with the specifications and requirements of the said City. Thereafter the A. H. Dollard Coal Sales Company duly assigned the said contracts to the Interstate Coal Company, Inc., who duly assumed the same and agreed to do and perform all the stipulations which by the terms thereof were to be done or performed by the A. H. Dollard Coal Sales Company; and the Interstate Coal Company, Inc., well knew that the defendant had contracted to purchase such coal with the intention and for
84 the purpose aforesaid.

IV. That the defendant has duly performed all the terms of said contracts upon his part to be performed, but the Interstate Coal Company, Inc., has failed to perform said contracts, and has neglected and refused to deliver coal under said contracts, although delivery thereof has been duly demanded, in the following approximate amounts respectively: Under No. 160, 1,708-98/100 tons; under No. 162, 3,607 tons; under No. 163, 7,258 tons.

V. That by reason of the neglect and refusal of the Interstate Coal Company, Inc., to perform said contracts as aforesaid, defendant was compelled to buy coal in the open market at prices in excess of the prices specified in said contract, in order to fulfil his said contracts for the resale of said coal; and that only a small part of the coal which he was able so to purchase conformed to the specifications, and analyzed according to the requirements of the City of New York, so that under the terms of said contracts for the resale of such coal he was obliged to deduct from the resale price thereof certain percentages, determined by the degree in which said coal purchased by defendant in the open market differed upon analysis from said City requirements.

In certain instances defendant was also obliged to reimburse said Burns Bros. the excess cost of delivering such coal to one of the aforesaid City hospitals over the price at which he had contracted to sell it so delivered. The dates of such purchases by defendant, the respective boats on which the coal so purchased was loaded, the excess prices and cost of delivery so paid, and the amounts of such deductions are set forth in the statement hereto annexed and made a part hereof, marked Schedule "A."

VI. That by reason of the premises. defendant has been damaged in the sum of Nine thousand nine hundred ninety-nine and 10/100 ($9,999.10) Dollars, with interest on each of the respective items making up such sum from the date on which it accrued, as set forth in Schedule "A."

88 *Amended Answer.*

WHEREFORE, the defendant demands judgment that the complaint herein be dismissed, and that he have and recover judgment against the plaintiff in the sum of Nine thousand nine hundred ninety-nine and 10/100 ($9,999.10) Dollars, with interest as set forth in Paragraph VI of the counterclaim, together with the costs and disbursements of this action.

ZABRISKIE, MURRAY, SAGE & KERR,
Attorneys for Defendant,
89 Office and P. O. Address,
No. 49 Wall Street,
Borough of Manhattan,
New York City.

STATE OF NEW YORK, }
County of New York, } ss.:

ARTHUR SIDNEY DAVISON, being duly sworn, deposes and says: That he is the defendant in this action; that he has read the foregoing amended answer and knows the contents thereof, and that the same is true of his own knowledge, except as
90 to those matters therein stated to be alleged upon information and belief, and as to such matters he believes it to be true.

ARTHUR SIDNEY DAVISON.

Sworn to before me this 26th }
day of February, 1917. }
G. G. ZABRISKIE,
(Seal.) Notary Public,
New York County No. 4.
Certificate filed in Kings County.

Amended Answer.

91

SCHEDULE "A"

Name of Boat	*Penalty*	*Diff. in Price*	*Total*
"E. T. Douglas"	$22.32	$626.64	$648.96
"Trenton"	132.95	487.15	620.10
"S. M. Provost"	37.48	738.00	775.48
"Samuels"	46.48	546.50	592.98
"C. W. Meade"	23.24	700.22	723.46
"Burns Bros. #38"		155.64	155.64
"P. J. McNally"	129.18	454.05	583.23
"Annie L. Ward"		458.20	458.20
"Jack Hackett"	161.46	511.70	673.16
"Golden Locks"		328.96	328.96
"Nora Farrell"	26.39	452.99	479.38
"Maurice Woods"	66.55	624.32	690.87
"S. M. Provost"	73.50	294.36	367.86
"Nora Farrell"	26.37	261.63	288.02
"Wm. Farrell"	32.85	284.24	317.09
"M. R. Farrell"		125.19	125.19
"Matt Wilson"		526.96	526.96
"Henry & Marion"		348.15	348.15
"W. F. Armstrong"		630.00	630.00
"N. H. Wilson"	177.95	301.23	479.18
"W. W. Aldrich"	13.72	325.95	339.67

92

93

Additional cost of delivering coal from Burns Bros.' yard to Harlem Hospital from Nov. 13th to Nov. 20, 1915 — 39.07

Do. from Jan. 4th to Jan. 14, 1916 — 155.64

$9,999.10

94 **Reply.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER PETERSON, as Receiver of the Interstate Coal Company, Inc.,

Plaintiff,

against

ARTHUR SIDNEY DAVISON,

95 *Defendant.*

The plaintiff herein replying to the alleged counterclaim of the defendant, as set forth in the second, separate and independent defense of its amended answer in the above entitled action, upon information and belief,

FIRST: Admits the allegations in said alleged counterclaim, stated and contained in Paragraphs 1 and 2.

SECOND: Denies knowledge or information sufficient to form a belief as to the allegations in said
96 alleged counterclaim, stated and contained in Paragraphs 3, 4, 5 and 6.

WHEREFORE, plaintiff demands that the counterclaim be dismissed with costs, and that the judgment be had, as asked for in the complaint herein.

KELLOGG & ROSE,
Attorneys for Plaintiff,
Office & Post Office Address,
115 Broadway,
Borough of Manhattan,
City of New York.

Reply. 97

STATE OF NEW YORK, }
County of New York, } ss.:

WALTER PETERSON, being duly sworn, says that he is the plaintiff in this action. That he has read the foregoing reply and that the same is true to his own knowledge, except as to the matters which are therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

WALTER PETERSON.

98

Sworn to before me this 28th }
day of February, 1917. }

LAWRENCE L. CASSIDY,
(Seal.) Notary Public, No. 60,
New York County.

99

100 **Notice of Motion and Affidavit.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER PETERSON, as Receiver of the Interstate Coal Company, Inc.,

Plaintiff,

against

ARTHUR SIDNEY DAVISON,

101 *Defendant.*

Sirs:

PLEASE TAKE NOTICE that upon the affidavit of Henry G. Gray, hereto annexed, sworn to the 22nd day of October, 1918, we shall move this Court at a Term thereof to be held at the United States Court House and Post-Office Building, in the Borough of Manhattan, City of New York, on the 1st day of November, 1918, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order appointing some suitable person as Auditor in the above-entitled action to make a preliminary investigation in order to simplify the issues involved herein so that they may be more intelligently presented to the jury. and directing him to hear the parties and any witnesses that may be produced, and to make a report thereon to this Court, giving him power to employ a stenographer to take the testimony, the expenses of said Auditor and stenographer to be divided between the parties hereto, and for

102

such other and further relief as to the Court may seem proper.

Dated, New York, October 22nd, 1918.

Yours, etc.,
ZABRISKIE, MURRAY, SAGE & KERR,
Attorneys for Defendant,
Office & Post Office Address,
49 Wall Street,
Borough of Manhattan,
New York City.

104

To:
MESSRS. KELLOGG & ROSE,
Attorneys for Plaintiff,
115 Broadway,
New York City.

105

106 *Notice of Motion and Affidavit.*

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

WALTER PETERSON, as Receiver of the Interstate Coal Company, Inc.,

Plaintiff,

against

ARTHUR SIDNEY DAVISON,

107 *Defendant.*

COUNTY OF NEW YORK, ss.:

HENRY G. GRAY, being duly sworn, says: I am a member of the firm of Zabriskie, Murray, Sage & Kerr, Attorneys for the defendant in the above-entitled action, and have full charge of the same. This is an action brought to recover the sum of $21,014.43 for coal sold and delivered to defendant by the Interstate Coal Company, Inc., of which plaintiff is the Receiver, between April 1, 1915 and February 6, 1916. The complaint alleges
108 and sets forth about one hundred shipments of coal, for which the aggregate selling prices, towing and trimming charges amounts to $84,533.86. It alleges that the payments made by the defendant, together with certain allowances and deductions, amounted to $63,519.43. The dates of these payments, allowances and deductions are set forth in a schedule annexed to the complaint and consists of about fifty items. The answer denies the statement that the coal shipped and the prices charged therefor is correctly set forth in the complaint, and further denies that the statement of the payments made by the defendant and the al-

lowances and deductions to which the defendant was entitled are correctly set forth in the complaint, and this is not a mere technical denial, but there is a substantial disagreement between the plaintiff and the defendant on the points mentioned. Furthermore, the answer sets forth as an affirmative defense that the Interstate Coal Company warranted that all the coal delivered to the defendant should conform to the specifications and analyze according to the requirements of the City of New York, and agreed that if the coal so delivered should not conform to such specifications 110
and analyses the defendant might make deductions accordingly; that the total amount of coal sold and delivered by the Interstate Coal Company to defendant during the period mentioned was at an agreed price of $113,512.68; that a large portion of the coal so delivered failed to comply with the City requirements, and the defendant accordingly became entitled to deductions which, together with the commissions to which the defendant was entitled, amounted to $23,-264.38; that the defendant actually paid the Interstate Coal Company the sum of $88,769.78, 111
leaving a balance due to plaintiff of less than $2,000. A second affirmative defense sets forth three special contracts for the sale of coal to be consigned to William Farrell & Son and Burns Brothers, which contracts provided that the coal delivered thereunder should conform to the specification and analyze according to the requirements of the City of New York; that the seller knew that the coal was to be resold by defendant to William Farrell & Son and Burns Brothers, in order to enable the latter to sell the same to

the City of New York; that the Interstate Coal Company failed to deliver certain specified tonnage under said contracts by reason of which defendant was compelled to buy coal in the open market at prices in excess of the prices specified in the contracts, resulting in a loss to defendant of $9,999.10.

Plaintiff in his complaint has not only failed to set forth many shipments of coal during the period stated, but has omitted to credit the de-
113 fendant with the vast number of payments and deductions to which he is entitled, the deductions consisting of (a) penalties because the coal did not come up to said analyses; (b) commissions and cash discounts; (c) freight and demurrage items, etc. In order to establish the defense to this action, irrespective of the set-off or counterclaim contained in the answer, it will be necessary for defendant to offer evidence regarding 123 shipments of coal, 79 payments, 83 penalty items, 120 commission and cash deduction items, and 10 freight and demurrage items. The account is such a complicated one that it would be absolutely
114 impossible for any jury to properly determine the issues involved. In the truest sense of the term, an examination of a long account is involved.

The Interstate Coal Company went into the hands of a receiver in May, 1916, but no action was brought against the defendant by the Receiver until November, 1916. The Amended Answer of defendant was served on February 26, 1917, and a Reply on March 2, 1917. The case first appeared on the Day Calendar on April 10, 1917, but as no one appeared on behalf of the plaintiff, it was marked off the Calendar and no steps were taken

by plaintiff to restore it to the Calendar until December, 1917. It re-appeared on the Day Calendar last May and has been since adjourned. It is now set down for trial on November 11th next.

In June, 1918, the attorneys for defendant made repeated efforts to get the attorneys for plaintiff to consent to the case being sent to a Referee or else to consent to an examination of the books of all parties concerned by expert accountants selected by each side under a stipulation that any part of the report of either of such expert accountants might be introduced in evidence as *prima facie* evidence of the truth of the facts reported on, but the attorneys for the plaintiff refused both propositions.

This application was not made at an earlier date because I am Chairman of one of the Local Draft Boards of this City on the lower East Side, and I have been so very busy with that work in addition to work of an urgent character in my law office that I was not able to take up this case to prepare for trial before.

No previous application has been made for an order sending this action to an Auditor or Referee.

HENRY G. GRAY.

Sworn to before me this 22nd day of October, 1918.

CHARLES F. HOFFMAN,
Notary Public,
Westchester County.
Certificate Filed in New York Co. Clk's No. 189, Register's No. 9162.
My Commission Expires March 30, 1919.

(Seal)

118 **Affidavit in Opposition to Motion.**

UNITED STATES DISTRICT COURT.

SOUTHERN DISTRICT OF NEW YORK.

WALTER PETERSON, as Receiver of the Interstate Coal Company, Inc.,

Plaintiff,

against

ARTHUR SIDNEY DAVISON,

119 *Defendant.*

STATE OF NEW YORK, }
County of New York, } ss.:

ABRAM J. ROSE, being duly sworn, deposes and says, that he is a member of the firm of Kellogg & Rose, attorneys for the above named plaintiff, and has had and now has personal charge of this action.

That the plaintiff was appointed Receiver by an order of this Court made on the 7th day of
120 August, 1916, in sequestration proceedings.

That this action was begun about the first of November, 1916, and is brought to recover for coal sold and delivered, and moneys laid out and expended for towing and trimming, the sales being made and the moneys laid out between the 12th day of April, 1915, and the 25th day of August, 1915.

That annexed to the complaint is a detailed statement showing the date of the delivery of the coal, the name of the boat delivering the coal, the quantity on each boat, the kind of coal, and the

price, together with the items of the amount of towing and trimming claimed. That the aggregate amount of such claim is $84,533.86.

That part of said schedule annexed to said complaint is a statement of the payments which were made in cash, the dates of such payments and also the allowances or deductions from the bills which were made showing the items of such allowance, the payments beginning on the 1st of June, 1915 and ending on the 29th of February, 1916, the payments and allowances aggregating, as shown 122
by said statements, $63,519.43, leaving a balance due of $21,014.43, which is the amount claimed in the complaint.

That the defendant served an amended answer herein, in and by which he admits that the defendant is doing business under the name as alleged in the complaint. He admits the due appointment of the plaintiff as Receiver, and then admits that between April 1st, 1915, and February 1st, 1916 (and also thereafter), the Interstate Coal Company, Inc., delivered certain coal to the defendant and paid certain sums for the towing 123
and trimming thereof, but denies that the statement annexed to the complaint, referred to as Schedule A, is a correct statement of the matters therein referred to.

By the fifth paragraph of the defendant's amended answer, he admits that certain payments were made to the Interstate Coal Company, Inc., and certain allowances and deductions made, but believes that the statement referred to as Schedule

124 *Affidavit in Opposition to Motion.*

B is a full and complete statement of all the payments made and of all allowances and deductions to which he is entitled.

Defendant then sets up a separate defense that as to the coal sold and delivered, and as to other coal sold between April 1st, 1915, and February 18th, 1916, it did not conform to the warrantees as to specifications and analysis, and claims a deduction or allowance amounting to some $23,000. He also alleges that he made payments for
125 coal aggregating $88,769.78. He then sets up a second, separate and independent defense by way of counterclaim, alleging contracts made with the A. H. Dollard Coal Sales Company for the delivery of certain quantities of coal, and that such contracts were assigned to the Interstate Coal Company, Inc., and that there was a breach on the part of the Interstate Coal Company, Inc., that he purchased coal to fill the contracts and his damages therefor are some $9,999.10.

That shortly after the 27th of December, 1917,
126 deponent caused a demand for a bill of particulars to be served upon the defendant's attorneys, requiring defendant to give the particulars showing wherein the schedule annexed to the complaint, showing deliveries of coal, was incorrect, and also showing wherein the schedule with regard to payments was incorrect as alleged in the answer, and also showing whether the contracts alleged in the second, separate and independent defense was in writing, and, if so, a complete copy thereof, and, if oral, what officer or agent of the A. H. Dollard Coal Sales Company made them, and a state-

ment of what the contracts were also a statement whether the alleged assignment of these contracts from the A. H. Dollard Coal Sales Company to the Interstate Coal Company, Inc., was in writing, and, if so, to give a copy thereof, and, if oral, a statement when the same was made, and with what officer or agent of the Interstate Coal Company the same was made.

Annexed hereto and made a part of this affidavit is a copy of the demand for a bill of particulars. 128

That in May, 1918, this case was on the calendar and called for trial, and the plaintiff, through deponent, answered ready, although the bill of particulars had not been served at that time. That the attorneys for the defendant requested the Court to postpone the case, and it was finally agreed in open court that the case should be postponed until about the middle of June, 1918, on condition that the defendant would serve a bill of particulars complying in all respects with the demand made upon him by the plaintiff.

That thereafter and on or about the 17th day 129
of June, 1918, the defendant did serve a partial bill of particulars. That in and by such bill of particulars, and by the schedule thereto annexed, he admits that every cargo of coal alleged in the complaint was delivered by the boats mentioned in the complaint on the dates mentioned in the complaint of the kind, quality and quantity alleged in the complaint, of the invoiced value, of the allowances that were made in the complaint, of the payment, of the towing and trimming alleged in the complaint; in other words, by his bill

130 *Affidavit in Opposition to Motion.*

of particulars, he admits that as between the dates set forth in the complaint, the exact quantity of coal, at the price mentioned in the complaint, with the allowances mentioned in the complaint, was sold and delivered to him by the Interstate Coal Company, Inc. It is true that in his bill of particulars, he alleges that certain other allowances were made which are not alleged in the complaint. He also, by his bill of particulars, in Schedule No. 2, admits the payments of all the moneys alleged in the complaint to have been made. In
131 both schedules he covers a period before and after that stated in the complaint, and as to which there is nothing claimed against him by which he claims the delivery of other coal and the payment of other moneys; in other words, according to his bill of particulars, there is nothing for the plaintiff to prove as he admits all the items alleged against him.

A copy of the bill of particulars served is hereto annexed.

With this bill of particulars, the attorneys for
132 the defendant sent a letter in which they state that the particulars as to the contracts, whether they were in writing or oral, as hereinbefore referred to, had not been furnished but "we will supply this information within the course of the next few days, and trust that this arrangement is satisfactory to you." A copy of that letter is hereto annexed.

Up to the present time, no such information has yet been furnished, although the case was on the calendar in October, 1918, and was set for

the 11th day of November, 1918, peremptorily by the Trial Court.

Deponent further says that this is an action at law in which the plaintiff is entitled to a jury trial, both as to the claim which can be proved in a very short time because it is practically all admitted, and also as to the counterclaim which the plaintiff has denied.

Deponent respectfully submits that there is no power in this Court to order the matter referred to an Auditor or Referee, or to in any way deprive the plaintiff of his right to a trial by a jury. 134

Deponent therefore asks that this motion be denied.

ABRAM J. ROSE.

Sworn to before me this 31st day of October, 1918

WM. H. O'BRIEN,
Notary Public,
Westchester County.

(SEAL)

My Commission Expires March 30th, 1920. 135
New York Co. Clerk's No. 2.
New York Co. Register's No. 10001.

136 **Demand for Bill of Particulars.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER PETERSON, as Receiver of the Interstate Coal Company, Inc.,

Plaintiff,

against

ARTHUR SIDNEY DAVISON,

Defendant.

137

PLEASE TAKE NOTICE that demand is hereby made upon you that you serve upon the undersigned within ten days after service of this notice is made upon you, a Bill of Particulars of the items of your claim and matters hereinafter stated:

FIRST: Showing the dates upon which the coal was delivered, the kind and quantity of coal delivered, and the barge and vessel by which it was delivered by the Interstate Coal Company, Inc., to the defendant, such particulars to cover the
138 allegation in Paragraph "III" of the amended answer herein, as follows:

> "That he admits that between April 1, 1915, and February 1, 1916, and also thereafter the Interstate Coal Company, Inc., delivered certain coal to the plaintiff and paid certain sums for the towing and trimming thereof."

SECOND: Showing in what particulars the statement annexed to the complaint herein, referred to as Schedule "A" is incorrect.

THIRD: Showing the particulars as to the payments made by the defendant to the Interstate Coal Company, Inc., which by the fifth paragraph of his amended answer he admits having made.

FOURTH: Showing the allowances and deductions which were made by the Interstate Coal Company, Inc., to the defendant as admitted in his amended answer in said Paragraph "V."

FIFTH: Showing wherein the statement annexed to the complaint, referred to as Schedule "B," is not a full and complete statement of all 140
payments made by the defendant and of all allowances and deductions to which the defendant was and is entitled, pointing out with particularity what payments, allowances and deductions in Schedule "B" he admits to be correct.

SIXTH: Showing the date when the coal was delivered, the kind and quantity of coal delivered, the barge or vessel upon which it was delivered and the amount of advances made to carriers and for other purposes, all of which were billed to the defendant at the total price of $113,512.68, as alleged and stated in the second paragraph of 141
the First and Separate, Defense in this action.

SEVENTH: Showing the deductions to which the defendant claims to have been entitled, the charges for freight, and demurrage which the defendant claims he was obliged to pay on account of the Interstate Coal Company, Inc., and the commissions which he claims were agreed upon to be allowed to the defendant by the Interstate Coal Company, Inc., amounting to $23,264.38, as alleged in Paragraph "III" of the First and

142 *Demand for Bill of Particulars.*

Separate Defense in this action. That if the agreement for commissions alleged in said paragraph was in writing, that a copy of such agreement be furnished, and, if oral, a statement of such agreement and the name of the officer of the Interstate Coal Company, Inc., with whom it was made and when made.

EIGHTH: Showing whether the contracts which, as alleged by the third paragraph of the Second, Separate and Independent Defense herein, were
143 entered into between the defendant and the A. H. Dollard Coal Sales Company, were in writing, and if so, that full and complete copies thereof be furnished, and if oral, a statement when the same were made and the officer or agent of the A. H. Dollard Coal Sales Company with whom the same were made, and a full statement of what such contracts were.

NINTH: Showing whether the assignment of such contracts from the A. H. Dollard Coal Sales Company to the Interstate Coal Company, Inc., which, as alleged in the third paragraph of the
144 said Second, Separate and Independent Defense, was made, was in writing, and if so, give a full and complete copy thereof, and if oral, a statement of the same when made and with what officer

 145

or agent of the Interstate Coal Company, Inc., the same was made.

Dated, New York, December 27, 1917.

KELLOGG & ROSE,
Attorneys for Plaintiff,
Office and Post Office Address,
No. 115 Broadway,
Borough of Manhattan,
New York City.

146

To:
MESSRS. ZABRISKIE, MURRAY, SAGE & KERR,
Attorneys for Defendant,
49 Wall Street,
New York City.

147

148 **Bill of Particulars.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER PETERSON, as Receiver, etc.,
Plaintiff,

against

ARTHUR SIDNEY DAVISON,
Defendant.

149

The following is a bill of particulars of the matters called for by the demand heretofore made herein on the day of December, 1917.

I. In answer to the demand contained in Paragraps FIRST, SECOND, FOURTH and SIXTH, defendant submits herewith a statement marked "Schedule 1," showing (a) The dates of all shipments of coal by the Interstate Coal Company, Inc., to the defendant; (b) The name of the barge or vessel; (c) The kind and quantity
150 of coal delivered; (d) The amount of the invoices; (e) The allowances, by way of penalty, freight and commissions; and (f) The net amount due from defendant.

II. In answer to the demand contained in Paragraph THIRD, defendant admits that the payments referred to in Schedule B, annexed to the complaint, were made, but that certain additional payments were made, as per list hereto annexed, marked "Schedule 2."

III. In answer to the demand contained in Paragraph FIFTH, defendant refers to Schedules 1 and 2 annexed to this Bill of Particulars.

IV. In answer to the demand contained in the first sentence of Paragraph SEVENTH, defendant refers to Schedules 1 and 2 annexed to this Bill of Particulars; As to the particulars demanded in the second sentence of said paragraph, defendant states that the agreement referred to as to commissions were oral, and was made with A. H. Dollard on or about June 21, 1915. 152

Yours, &c.,
ZABRISKIE, MURRAY, SAGE & KERR,
Attorneys for Defendant,
Office & Post Office Address,
49 Wall Street, Manhattan,
New York City.

To:
MESSRS. KELLOGG & ROSE,
Attorneys for Plaintiff,
115 Broadway,
New York City.

153

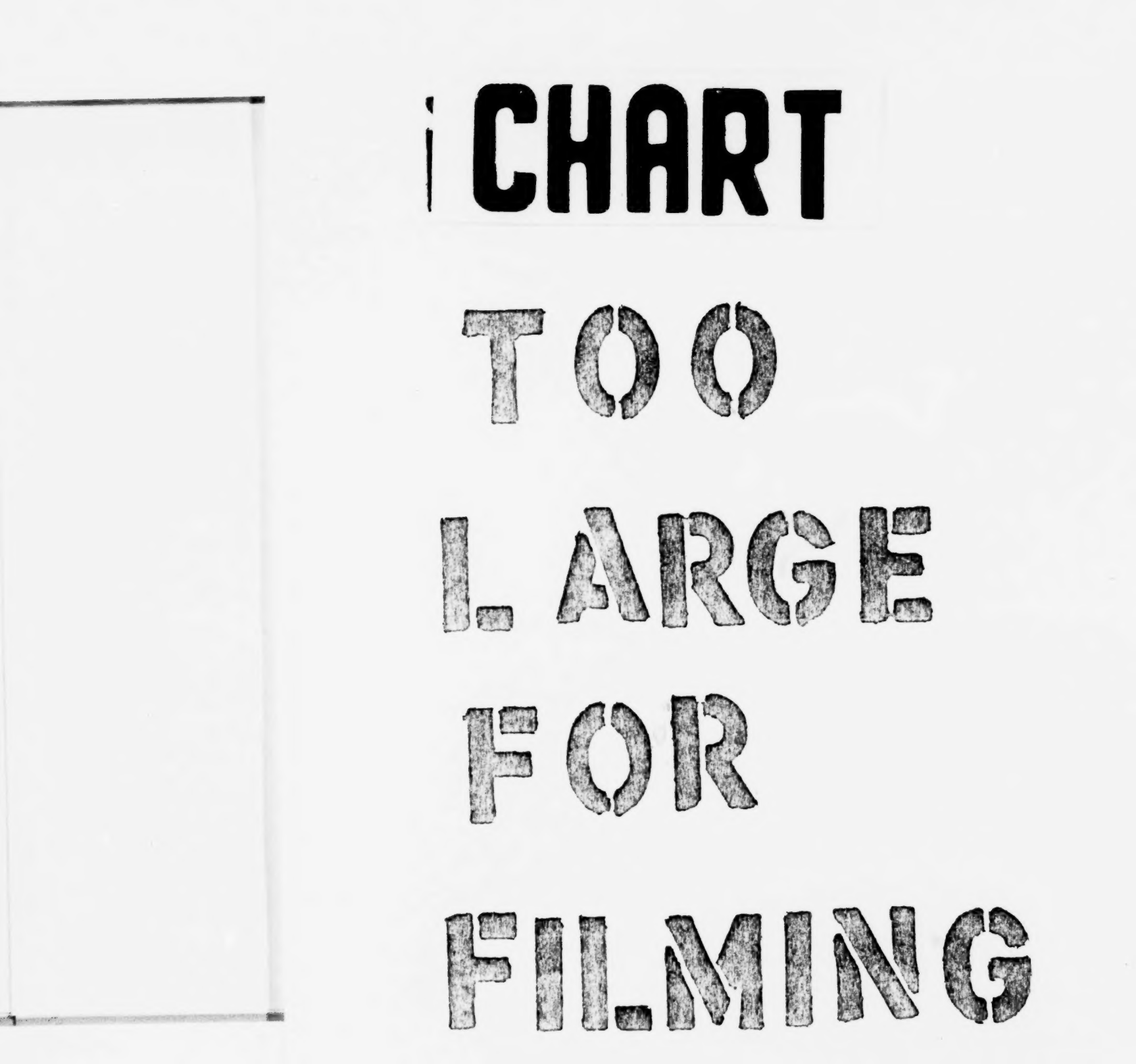


CHART
TOO
LARGE
FOR
FILMING

SCHEDULE #2.

June	7,	1915,	Check	$ 353.50	
July	7,	"	"	1,420.29	
"	1,	"	"	253.09	
"	15,	"	"	244.92	
"	24,	"	"	837.50	
"	24,	"	"	961.03	
Aug.	2,	"	"	2,793.03	
"	9,	"	"	505.52	
"	10,	"	"	1,658.24	
"	10,	"	"	2,436.30	
"	14,	"	"	511.93	158
"	20,	"	"	2,201.42	
"	24,	"	"	31.10	
"	25,	"	"	190.19	
"	30,	"	"	871.68	
Dec.	3,	"	"	400.12	
"	8,	"	"	1,215.80	
"	10,	"	"	256.69	
"	16,	"	"	883.04	
"	21,	"	"	464.08	
"	21,	"	"	288.11	
Jan.	3,	1916,	"	1,733.81	
"	31,	"	"	1,099.00	
Feb.	15,	"	"	1,308.93	
"	29,	"	"	903.46	159
"	29,	"	"	468.85	
"	29,	"	"	300.00	
Mar.	2,	"	"	1,526.17	
"	2,	"	"	638.27	
"	2,	"	"	338.10	
			Total additional payments	$27,094.17	

160 *Bill of Particulars.*

COPY

ZABRISKIE, SAGE, KERR & GRAY
Counsellors at Law
49 Wall Street
New York

Peterson v. *Davison.* June 17, 1918.

MESSRS. KELLOGG & ROSE,
115 Broadway,
New York City.

161 Gentlemen:

We are sending you herewith Bill of Particulars in accordance with your demand.

You will note, however, that we have not furnished the particulars demanded in Paragraphs VIII and IX of your demand. We will supply this information within the course of the next few days, and trust that this arrangement is satisfactory to you.

Very truly yours,
(Signed) ZABRISKIE, SAGE, KERR & GRAY.

Encl.

162 G P/F

Order.

163

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER PETERSON, as Receiver, etc.,
Plaintiff,
against
ARTHUR SIDNEY DAVISON,
Defendant.

164

AUGUSTUS N. HAND, District Judge:

This is a motion for the appointment of an auditor to report as to the facts and circumstances in an action brought to recover for coal sold and delivered. The items in dispute are very numerous. I am convinced from reading the affidavits that the trial of this case will involve a consideration of so many separate issues of fact that a jury will, under any circumstances, have constant difficulty in remembering and passing upon the issues involved. The contention of plaintiff's counsel that the facts are largely admitted ignores over two hundred items which the defendant proposes to attempt to establish by way of defense. Without a preliminary investigation the situation will be likely to be almost intolerable for the Court and the jury might become so confused as to reach its verdict largely by guesswork. This is the kind of case where a preliminary report by a skilled auditor will be of substantial service. The practice is approved and is under proper conditions most desirable.

165

166 *Order.*

Davis *v.* St. Louis R'y Co., 25 Fed., 786;
Fenno *v.* Primrose, 119 Fed., 801;
Corporation *v.* Houlihan, 184 Fed., 252;
Craven *v.* Clark, 186 Fed., 959;
Vermeule *v.* Reilly, 196 Fed., 226;
United States *v.* Wells, 203 Fed., 146.

The idea of appointing an auditor in an action at law when numerous items are involved in the issues of fact raised by the pleadings appears to have originated in the method of procedure under
167 the old common law action of account. Various statutes have been enacted in different states to remedy the difficulty incident to the trial of an action involving a great number of disputed items by a jury.

In New York a referee has, since colonial times, been appointed under the State Statutes in cases involving a so-called long account. This referee does not report in aid of the Court or jury, but is, under the present Code of Procedure, appointed to try the issues.

168 The history of the New York practice is set forth with learning by Judge Earl, in the case of Steck *v.* C. F. & I. Co., 142 N. Y., 236. It appears from that case that while under the Dutch rule actions involving long accounts could be referred to arbitrators, this mode of trial was not pleasing to the English colonists, and disappeared after the British occupation. For nearly a hundred years thereafter actions in the common law courts were wholly triable before juries, except the action of account, which was only applicable to the

limited number of cases hereinafter mentioned. The difficulties inherent in this action were such that, as Judge Earl says:

> "The practice became general for merchants and others having long accounts to enforce their collection by actions of assumpsit, which were always then triable by jury. But the embarrassments attending the trial of such actions by jury were such that, December 31, 1768, an act (2 Van Schaick's Laws of New York, 517) was 170
> passed, with a preamble as follows: 'Whereas, instead of the ancient action of account, suits are of late, for the sake of holding to bail, and to avoid the wager of law, frequently brought in assumpsit, whereby the business of unraveling long and intricate accounts, most proper for the deliberate examination of auditors, is now cast upon jurors, who at the bar are more disadvantageously circumstanced for such services and this burden upon jurors is greatly increased since the laws made for
> permitting discounts in support of a plea 171
> of payment, so that by the change of the law and the practice above mentioned, the suits of merchants and others upon long accounts are exposed to erroneous decisions, and jurors perplexed and rendered more liable to attaints and by the vast time necessarily consumed in such trials, other causes are delayed and the general course of justice greatly obstructed. Be it, therefore, enacted, etc., that whenever it shall

appear probable in any cause depending in the Supreme Court of Judicature of this colony (other than such as shall be brought by or against executors or administrators) that the trial of the same will require the examination of a long account, either on one side or the other, the said court is hereby authorized, with or without the consent of parties, to refer such cause by rule, to be made at discretion, to referees, * * *
173 and if the report or award of the referees, or of the major part of them, shall be confirmed by the said court, and any sum be thereby found for the plaintiff, judgment shall be entered for the same, with a *relicta verificatione*, as by confession with costs, if by law the plaintiff would have recovered costs, had a verdict passed in the same cause for the sum so reported to be due; but if, after payment pleaded, any sum shall be reported to be due to the defendant, and the award be confirmed, he shall have judgment and recover his costs. * * *
174 And when such referees shall report that nothing is due from the defendant, and the report be confirmed, then judgment shall be entered as by *non pross*, and the defendant shall recover his costs, to be taxed, and such judgment be a perpetual bar.' ''

This statute was re-enacted and was in force at the time of the adoption of the State Constitution of 1777, and consequently was not subject to the guarantee as to jury trial provided therein.

175

It is to be noticed that these statutory enactments did not provide for a trial before a referee, for the report of the referee was subject to confirmation, but they did do away with jury trials in cases involving a long account.

Section 1013 of the Code of Civil Procedure makes the referee the court, dispenses with a jury, and judgment is entered upon his report as upon a decision of the court itself.

In Massachusetts, an official may be appointed, in such cases called an auditor, but his report is not necessarily a final determination upon which judgment is entered, but is *prima facie* evidence if a jury trial of the issues is demanded. 176

In the Federal courts where a jury trial is a constitutional right, any auditor's report can be used only as an aid to court and jury. It can be regarded at most as evidence and nothing more. The report is but a method of simplifying the issues.

Professor Langdell has, with much learning, expounded the history of the common law action of account in his essay on equity jurisdiction published in the Harvard Law Review, Vol. II, pp. 243-257. This ancient form of action was allowed only against guardians, receivers and bailiffs. A receiver in the sense used was a person who received money belonging to another for the sole purpose of keeping it safely and repaying it to the owner. A bailiff was in effect a person who was a managing agent of land, and was accountable for the rents. 177

178 *Order.*

It thus appears that the action of account always involved a fiduciary relation between plaintiff and defendant and was limited to certain specific cases. It differed from a suit in equity for an accounting because the latter might be based upon an equitable title, whereas, if I am not mistaken, an action at law proceeded upon the theory that the legal title to the *res*, for which the defendant was accountable, was in the plaintiff.

In the common law action of account the de-
179 fence consisted of either a denial of the fiduciary relation, or an affirmative plea of "*plene computavit*," and the issue as to whether the defendant should render an account or not was triable by a jury. If there was a verdict for the plaintiff, judgment "*quod computet*" was rendered against the defendant upon which, unless he got bail, he was imprisoned until any judgment which might be rendered against him, should be satisfied. In the judgment "*quod computet*," which was essentially interlocutory, the court appointed three auditors to take and state the account. If
180 the account showed a balance in favor of the plaintiff, final judgment was rendered thereon, for the balance due.

If a person liable to account at law converted plaintiff's money to his own use, or promised to pay it, an action of either "indebitatus assumpsit" or debt, would lie, provided the amount had been stated. (See Langdell Article, *supra*, pp. 253-254, and cases cited.)

It is easy to see how this ancient action of account served as a historical background for the

modern statutory enactment in actions at law where multiplicity of items would render a trial by jury very difficult. The action of "indebitatus assumpsit" gradually supplanted at common law the action of account, though it extended over a much wider field. This form of action involved but one stage, and provided for a jury trial without auditors, but was at times confused with account and used where account was the strictly proper remedy, until the latter became practically obsolete as a form of action at law. Many of its features survived in a suit in equity for an accounting, and I think it may be said that all issues formerly determined in the common law action of account were after it became obsolescent determined either at law or in an action of "indebitatus assumpsit," or in equity in a suit for an accounting. 182

It thus appears that the statement of Brewer, *J.* (then Circuit Judge), in the case of Davis *v.* St. Louis & S. F. R'y Co., 25 Fed., 786, that

> "it was the practice in the old English courts, the old common-law practice, where it was apparent that the examination of a long account was involved, to refer such account to a referee to report on the facts" 183

was historically quite inaccurate as applied to an action arising out of breaches of contract where no fiduciary relation appears to have existed. Nevertheless, his decision, like others I have heretofore cited, shows the tendency of the common law to seize upon analogies derived from former practice and extend that practice to meet manifest needs.

184 *Order.*

The leading case on this subject is the case of Fenno *v.* Primrose, 119 Fed., 801, by the Circuit Court of Appeals of the First Circuit, which has been since followed in that Circuit, and by Judge Holt in the case of Vermeule *v.* Reilly, *supra*, in this district, and approved of in a learned opinion by Judge Sandford in the case of United States *v.* Wells, *supra*.

I can see no constitutional difficulty in allowing a report of an auditor to simplify the issues
185 to be introduced in evidence before the jury, subject, of course, to the control of the court as to all matters of law which may be applicable to the same, and subject to the final determination by the jury as to all matters of fact in the case, whether embraced in the report or not. Craven *v.* Clark, 186 Fed., 959.

The case of Sulzer *v.* Watson, 39 Fed., 414, which was heard before Wallace and Wheeler, *JJ.*, in the Circuit Court for the District of Vermont, prior to the Circuit Court of Appeals Act, is in no way against the conclusions which I have
186 reached and is an interesting case, especially as indicating the accurate knowledge of Judge Wheeler, who wrote the opinion, as to forms of action. That was an action of book-account, known to Connecticut and Vermont lawyers, and involving an appointment of auditors who heard and finally determined the issues. The plaintiff moved for the appointment of auditors to try the issues. The court denied this for the very good reason that it would deprive the defendant of his right of trial by jury. Judge Wheeler said:

"It is an action at law, although not in any form known to the common law, and although courts of equity have jurisdiction of some matters of account, they never have had any of matters merely in assumpsit, which may be involved in an action like this. These are called matters of account because they may be kept on books of account, and not by reason of any relation of trust between the parties out of which the transactions might arise, such as courts of equity take cognizance of. * * * In this 188 case there can be no trial by auditors, therefore no auditors should be appointed."

This case merely indicates:

(1) That in any action of assumpsit brought in the United States Court a trial by jury is necessary;

(2) That where the defendant was in no fiduciary relation to the plaintiff, a reference which would dispense with a jury was neither permissible at law nor in equity; 189

(3) That a state statute could not deprive the defendant of his right to a jury trial.

In the case of Swift *v.* Jones, 145 Fed., 489, the Circuit Court of Appeals for the Fourth Circuit, held that in an action at law, the trial judge had no power, even with the acquiescence of both parties, to order a trial before a special master who should report his findings to the court, and that such mode of procedure deprived the parties of their jury trial. This case was referred to by

190 *Order.*

Judge Sanford in United States *v.* Wells, *supra*, and does no more than decide that trial by jury must be preserved. In my opinion, the form of the present order, just as the method of procedure under the Massachusetts Statute, does essentially preserve trial by jury.

The order to be entered should appoint Wallace Macfarlane, Esq., auditor,

> "to make a preliminary investigation as to the facts; hear the witnesses; examine the
191 accounts of the parties and make and file a report in the Office of the Clerk of this Court with a view to simplifying the issues for the jury; but not to finally determine any of the issues in the action; the final determination of all issues of fact to be made by the jury on the trial; and the auditor to have power to compel the attendance of, and administer the oaths to, witnesses; the expense of the auditor, including the expense of a stenographer, to be paid by either or both parties to this action, in ac-
192 cordance with the determination of the trial judge."

The said auditor shall separately report as to the issues of fact, the following especially:

1. All deliveries of coal alleged to have been made by the Interstate Coal Company to the defendant which are not disputed by the defendant;

2. All payments alleged to have been made for coal delivered by the Interstate Coal Company to the defendant, which are not disputed by the plaintiff;

3. All deliveries of coal alleged to have been made by the Interstate Coal Company to the defendant, which are disputed by the defendant, with his opinion as to each of such disputed items;

4. All payments alleged to have been made by the defendant for coal delivered by the Interstate Coal Company to the defendant which are disputed by the plaintiff, with his opinion as to each of such disputed items;

5. The amount of charges for freight and demurrage which the defendant claims to have been 194
obliged to pay for the account of the Interstate Coal Company, the items thereof admitted by the plaintiff to be chargeable, and the items in dispute, with his opinion as to each of such disputed items:

6. All deliveries of coal alleged to have been made by the Interstate Coal Company to the defendant which are claimed by the defendant to have differed upon analysis from the requirements of the City of New York, with his opinion as to each of such items;

195

7. All settlements claimed by the defendant to have been made between the Interstate Coal Company and the defendant, whereby deductions were allowed by the plaintiff because the coal differed upon analysis from the requirements of the City of New York, with his opinion as to each of such allowances;

8. The amount of coal alleged by the defendant to have been contracted to be sold to the defendant by the A. H. Dollard Coal Sales Company,

196 *Order.*

and assumed to be delivered by the Interstate Coal Company, which when analyzed did not conform to the requirements of the City of New York, and the items of damage which the defendant claims to have suffered in order to fulfill its contracts for resale to William Farrell & Son and Burns Bros., with his opinion as to each of such items.

Judge Holt made an order much resembling the above in the case of Vermeule *v.* Reilly, *supra.*
197 Dated December 9, 1918.

A. N. H.,
D. J.

198

Objections to Order and Exception. 199

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER PETERSON, as Receiver of the Interstate Coal Company, Inc.,

Plaintiff,

against

ARTHUR SIDNEY DAVISON, 200

Defendant.

The defendant having made a motion on an order appointing some suitable person as auditor in the above entitled action to make a preliminary investigation in order to simplify the issues involved herein, so that they may be more intelligently presented to the jury, and directing him to hear the parties and any witnesses who may be produced, and to make a report thereon to this Court giving him power to employ a stenographer to take the testimony, the expenses of said 201 auditor and stenographer to be divided between the parties hereto,

Now comes the plaintiff and objects to the granting of said motion and to the entry of any order granting the same, or any part thereof, upon the ground that the court has no power to grant the motion or to enter such an order, or any part thereof that the granting of the motion and the entry of the order would be in violation of the rights of the plaintiff guaranteed to him

202 *Objections to Order and Exception.*

by the Seventh Article of the Constitution of the United States that this action being an action at law in which more than Twenty Dollars ($20) is involved, must be tried before a jury, and there is no authority in law against the consent of the plaintiff to authorize the taking of testimony before an auditor to simplify the issues or to compel the plaintiff to appear before an auditor or have an auditor appointed by any such order to administer an oath to witnesses or to employ a stenographer or to charge the expenses, or any
203 part thereof, to the plaintiff that as the claim of the plaintiff is practically admitted by the ander and defendant's bill of particulars, the same could not be compulsorily referred under the State Law, or under the United States Federal Law or Constitution, and the defendant by his answer, cannot set up a long account and thereby make a reference allowable or permissible against the objection of the plaintiff.

KELLOGG & ROSE,
Attorneys for Plaintiff,
Office and Post Office Address,
204 115 Broadway,
Borough of Manhattan,
New York City.

Plaintiff duly and timely filed and made the foregoing objection and on the same being overruled, was allowed an exception to such ruling.

AUGUSTUS N. HAND,
U. S. D. J.

Order and Notice of Entry. 205

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER PETERSON, as Receiver of the Interstate Coal Company, Inc.,
Plaintiff.
against
ARTHUR SIDNEY DAVIDSON.
Defendant. 206

SIRS:

PLEASE TAKE NOTICE that an order, of which the annexed is a copy, was duly filed and entered in the office of the Clerk of this Court for the Southern District of New York, on the 27th day of October, 1919.

Dated, New York, October 31, 1919.

Yours, etc.
ZABRISKIE, MURRAY, SAGE & KERR, 207
Attorneys for Defendant,
49 Wall Street,
New York City.

To:
MESSRS. KELLOGG & ROSE,
Attorneys for Plaintiff,
115 Broadway,
New York City.

208 *Order and Notice of Entry.*

At a Stated Term of the United States District Court for the Southern District of New York, held in the Post Office Building, in the Borough of Manhattan, City of New York, on the 27th day of October, 1919.

Present.—Honorable Augustus N. Hand, Judge.

209 Walter Peterson, as Receiver of the Interstate Coal Company, Inc.,

Plaintiff,

against

Arthur Sidney Davison,

Defendant.

A motion on behalf of the defendant having duly come on to be heard before this Court for an order appointing some suitable person as
210 Auditor in the above entitled action to make a preliminary investigation in order to simplify the issues involved herein so that they may be more intelligently presented to the jury, and directing him to hear the parties and any witnesses that may be produced, and to make a report thereon to this Court, giving him power to employ a stenographer to take the testimony, the expenses of said Auditor and stenographer to be divided between the parties hereto;

Now, upon reading and filing the notice of motion, dated October 22, 1918, and the affidavit of Henry G. Gray, thereto annexed, sworn to the 22nd day of October, 1918, submitted in support of said motion, and the affidavit of Abram J. Rose, sworn to the day of October, 1918, submitted in opposition thereto, and upon the pleadings herein, and after hearing Henry G. Gray, Esq., of Counsel for defendant, in support of said motion, and Abram J. Rose, of Counsel for plaintiff, in opposition thereto, and due deliberation having been had thereon, and after 212 reading the objection and exception on behalf of the plaintiff to the jurisdiction of the Court to make this order;

Now, upon motion of Zabriskie, Murray, Sage & Kerr, attorneys for the defendant, it is

ORDERED, that said motion be and the same hereby is granted to the extent hereinafter provided, and it is

FURTHER ORDERED, that Wallace Mcfarlane, Esq., an Attorney-at-law, with offices at Number 26 Liberty Street, Borough of Manhattan, City of 213 New York, be and he hereby is appointed Auditor, with instructions to make a preliminary investigation as to the facts; hear the witnessses; examine the accounts of the parties, and make and file a report in the Office of the Clerk of this Court with a view to simplifying the issues for the jury; but not to finally determine any of the issues in this action; the final determination of all issues of fact to be made by the jury on the trial; and the Auditor to have power to compel the attendance

214 *Order and Notice of Entry.*

of, and administer the oaths to, witnesses; the expense of the Auditor, including the expense of a stenographer, to be paid by either or both parties to this action, in accordance with the determination of the Trial Judge, and it is

FURTHER ORDERED, that said Auditor shall separately report as to the issues of fact, the following especially;

1. All deliveries of coal alleged to have been made by the Interstate Coal Company to the de-
215 fendant which are not disputed by the defendant; and the agreed prices therefor (including towing and trimming charges).

2. All payments alleged to have been made for coal delivered by the Interstate Coal Company to the defendant, which are not disputed by the plaintiff;

3. All deliveries of coal alleged to have been made by the Interstate Coal Company to the defendant, which are disputed by the defendant, and the agreed prices therefor (including towing and
216 trimming charges), with his opinion as to each of such disputed items;

4. All payments alleged to have been made by the defendant for coal delivered by the Interstate Coal Company to the defendant which are disputed by the plaintiff, with his opinion as to each of such disputed items;

5. The various charges for freight and demurrage which the defendant claims to have been obliged to pay for the account of the Interstate Coal Company, the items thereof admitted by the

plaintiff to be chargeable, and the items in dispute, with his opinion as to each of such disputed items;

6. The various penalties, commissions, cash discounts, and other deductions which defendant claims to be entitled to deduct from the invoice price of the various shipments, the items thereof which are admitted by plaintiff as proper deductions, and the items in dispute, with his opinion as to each of such disputed items.

7. His opinion as to the net amount due on 218
each invoice of coal sold and delivered to defendant.

8. All deliveries of coal alleged to have been made by the Interstate Coal Company to the defendant which are claimed by the defendant to have differed upon analysis from the requirements of the City of New York, with his opinion as to each of such items;

9. All settlements claimed by the defendant to have been made between the Interstate Coal Company and the defendant whereby deductions were 219
allowed by the plaintiff because the coal differed upon analysis from the requirements of the City of New York, and whereby other deductions were allowed by the plaintiff, with his opinion as to each of such allowances;

10. The amounts and kinds of coal alleged to have been sold to defendant by the A. H. Dollard Coal Sales Company (as set forth in folio 11 of the Amended Answer) under contracts which were later assigned to and assumed by the Interstate Coal Company; the amounts of coal alleged to

220 *Order and Notice of Entry.*

have been delivered under said contracts; the sums of money alleged to have been paid by defendant in the open market in order to replace the coal not delivered under said contracts in order to fulfill contracts for the resale of the coal contracted for; the penalties which defendant alleges he was obliged to pay because the coal so purchased in the open market did not conform to the requirements of the City of New York; the amounts which defendant alleges he was obliged to pay to Burns Bros. in order to reimburse them for the
221 excess cost of delivering some of the coal so purchased by defendant in the open market to one of the aforesaid City Hospitals over the price at which he had contracted to sell it so delivered; all items of damage which defendant alleges he suffered by reason of the non-delivery of the coal under the aforesaid contracts with the A. H. Dollard Coal Sales Company, with his opinion as to each of the foregoing items.

Enter.

AUGUSTUS N. HAND,
U. S. D. J.

222

Notice of Motion.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER PETERSON, as Receiver of the Interstate Coal Company, Inc.,

Plaintiff,

against

ARTHUR SIDNEY DAVISON,

Defendant.

PLEASE TAKE NOTICE that on the 28th day of November, 1919, at 10:30 o'clock A. M. a motion will be made at the Jury Term before the Hon. Augustus N. Hand that this cause be restored to the Trial Calendar for trial.

Yours, etc.,

KELLOGG & ROSE,
Attorneys for Plaintiff,
115 Broadway,
New York City.

To:

ZABRISKIE, MURRAY, SAGE & KERR,
Attorneys for Defendant,
49 Wall Street,
New York City.

226 **Order.**

At a Trial Term of the United States District Court held in and for the Southern District of New York, at the Post Office Building, in the Borough of Manhattan, City of New York, on the 28th day of November, 1919.

Present.—Hon. Augustus N. Hand, Judge.

227 Walter Peterson, as Receiver of the Interstate Coal Company, Inc.,

Plaintiff,

against

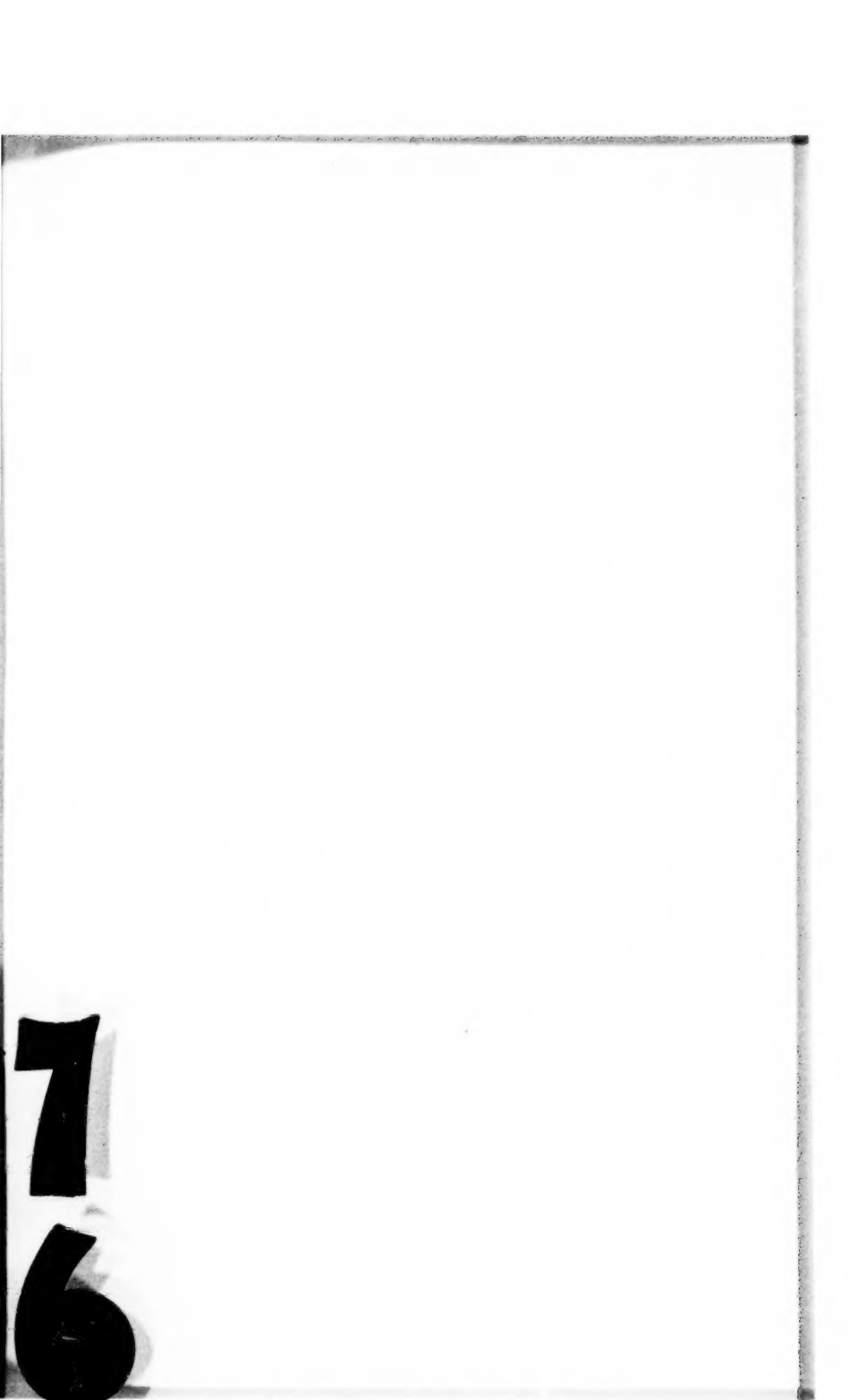
Arthur Sidney Davison,

Defendant.

On reading the notice of motion of the plaintiff to restore this case to the calendar for trial with proof of service on the attorneys for the
228 defendant, and the matter coming on to be heard, it is

Ordered, that the motion to restore the case to the calendar for trial be denied, and that all proceedings in regard to putting the case on the calendar for trial be and the same hereby are stayed until the coming in of the report of Wallace McFarland who was appointed auditor herein by an order dated the 27th day of October, 1919.

Augustus N. Hand,
U. S. D. J.



United States Supreme Court

WALTER PETERSON, as Receiver of the Interstate Coal Company,
Plaintiff,
against
ARTHUR SIDNEY DAVISON,
Defendant.

28 Orig'l.

Memorandum in Support of Application for Leave to File Motion for Writ of Prohibition and/or for a Writ of Mandamus.

The petition and papers show an action at law in the United States District Court, for the Southern District of New York, in which upwards of $20,000 is involved.

That the action is for goods sold and delivered, and money laid out and expended.

That the answer and bill of particulars practically admit the sale and delivery and the expenditure of the money alleged in the complaint.

The answer also alleges credits for allowances, and also a counterclaim for breach of contract.

The reply denies the counterclaim.

The District Court, against the opposition and objection of the plaintiff, has on the motion of the defendant sent the case to Wallace Macfarlane, calling him an auditor, to take testimony and report as to the items, and specify the issues, and has stayed the trial of the action until the coming in of his report.

The plaintiff insists that this is in violation of the Seventh Article of the Constitution of the United States.

That there is no such officer known to the Federal Law as an auditor in a common law action.

That there is no power in such person to administer an oath or to take testimony. A witness could not be punished for false swearing before such officer.

A common law action in the Federal Courts cannot be referred against the consent of either party. A trial before a court without a jury can only be had when a stipulation to that effect is made in writing and filed with the Clerk of the Court.

The proceeding before the so-called auditor is either a trial or not a trial. If it is a trial, it is not such as is provided by statute (U. S. Revised Statutes, Section 861) and guaranteed by the Constitution. If it is not a trial, it has no place in the procedure in a common law action.

There seems to be a difference of opinion in the different Circuit Courts as to whether there can be a proceeding before an auditor.

In the First Circuit, it seems to be allowed.

Pinno *v.* Primrose, 119 Fed. Rep., 801,

was a case where the question was raised as to the party liable for the auditor's fees, but the case does not show opposition to the appointment of the auditor, for the opinion (page 806) states, "The appointment was made on the Court's own motion." It was probably assented to because the State practice authorizes such a procedure.

In

Vermeule *v.* Reilly, 196 Fed. Rep., 226,

Judge Holt, in the Second Circuit, followed the case of Pinno *v.* Primrose, 119 Fed. Rep. 801, and appointed an auditor, but the case does not show whether it was opposed.

In

United States *v.* Harsha, 188 Fed. Rep., 759,

Judge Denison, in the Circuit Court for the Sixth Circuit, in a common law action, which involved forty thousand items, suggested to counsel:

> "* * * a general reference by consent or the appointment of an auditor under the State Statute. As the case stood for jury trial, the latter course also could be taken only by consent."

This suggestion was not agreed to, and when the cause was reached for trial, he suggested the proper course was an equitable action for an accounting, and entered a formal order refusing to proceed with the trial, and said, "If I am mistaken in entering such order, the question can be quickly raised and disposed of by mandamus proceedings."

In

Swift & Co. *v.* Jones, 145 Fed. Rep. 489,

the Circuit Court of Appeals for the Fourth Circuit, Judge Waddill, writing the opinion, said (page 493):

> "Moreover, the mode of proof presented for the trial of common law cases by Section

> 861, Rev. St., clearly indicated that such trials in the Federal Courts are only to be had before a jury or the Court in open court. It is 'that the mode of proof in the trial of the action at common law shall be by oral testimony and examination of witnesses in open court, except as hereinafter provided'." (The exception relates to depositions and commissions.)

And then he goes on further to say:

> "The question of following the State practice in matters of reference, referees and auditors has quite frequently been under review by the Federal Courts, and it may be said that the general trend of the decisions is to the effect that such statutes will not be followed, and that in said Courts, trial by jury is the only prescribed method for the ascertainment of facts, unless the same is waived as contemplated by the act." (Citing cases.)

The act meant is Section 649 of the Revised Statutes (U. S. Compiled Statutes, 1901, p. 525), which provides:

> "Issues of fact in civil cases in any Circuit Court may be tried and determined by the court without the intervention of a jury, whenever the parties or their attorneys of record file with the clerk a stipulation in writing waiving a jury."

It is respectfully submitted that in this case, by the entirely unauthorized action of the Court, the plaintiff is deprived of the right to a jury trial guaranteed to him by the Constitution, is required to submit testimony before an officer called an "auditor," which office is unknown to the Federal Law, to whom no statute gives the right to administer an oath, to whose rulings on evidence there

can be no exception that can be reviewed, whose report would be without force or effect, and evidence, or for any other purpose; that this Court should prohibit such so-called officer from exercising judicial functions, and should also require the District Court to proceed with the trial in the way provided by the Constitution and the Statutes; that this Court should grant the application and hear the motion asked for.

KELLOGG & ROSE,
Attorneys for Plaintiff,
Office and Post Office Address,
115 Broadway,
Borough of Manhattan,
New York City.

ABRAM J. ROSE,
ANTHONY L. WILLIAMS,
Of Counsel.

IN THE

Supreme Court of the United States

No. 28. ORIGINAL OCTOBER TERM, 1919.

In the Matter

of

WALTER PETERSON, as Receiver of the INTERSTATE COAL COMPANY, INC.,

Petitioner.

(Application for Writ of Mandamus or of Prohibition to the District Court of the United States for the Southern District of New York.)

BRIEF ON BEHALF OF PETITIONER.

ABRAM J. ROSE,

ANTHONY L. WILLIAMS,

Counsel for Petitioner.

The Court Press, Inc., Law Printers, 76½ Pine Street. Phone: John 6333

INDEX.

AUTHORITIES CITED IN SUPPORT OF APPLICATION.

AUTHORITIES CITED CONTRA.

IN THE

Supreme Court of the United States

No. 28, ORIGINAL OCTOBER TERM, 1919.

IN THE MATTER OF

WALTER PETERSON, as Receiver of the INTERSTATE COAL COMPANY, INC.,

Petitioner.

BRIEF FOR PETITIONER.

Statement.

This proceeding comes before this Court by order of this Court made January 12th, 1920, directing the HONORABLE AUGUSTUS N. HAND, or the United States District Judge for the Southern District of New York who may be at the time holding Trial Term of the United States District Court in said District to show cause before this Court on March 1st, 1920, or as soon thereafter as counsel can be heard, why a writ of prohibition and/or a writ of mandamus should not issue directing the said HONORABLE AUGUSTUS N. HAND, or the United States District Judge for the Southern District of New York, who may be at the time holding Trial Term of said Court, to restore the cause of Walter Peterson, as Receiver of the Interstate Coal Com-

pany, Inc., plaintiff, against Arthur Sidney Davison, defendant, pending therein, to the Trial Calendar that the same may be tried in the regular and usual way, and why such other and further relief should not be granted as may be proper in the premises.

(See Order to Show Cause.)

Proof of the due service of the order and a copy of the petition is on file with the Clerk of this Court.

By said petition it appears that an action at law was brought in the United States District Court for the Southern District of New York by the petitioner, Walter Peterson, as Receiver of the Interstate Coal Company, Inc., against Arthur Sidney Davison, to recover for goods sold and delivered, to-wit: Coal, and for moneys paid, laid out and expended by said company in connection therewith at his request, of the agreed price and value of $84,533.86, of which sum there had been paid on account and for allowances credited to the defendant $63,519.43, leaving a balance due of $21,014.43 (Record pages 7 to 9, folios 20-26).

Annexed to and made a part of the complaint is a schedule showing the kind and quantity of and the dates upon which the coal was delivered, and the name of the barges or vessels by which the several deliveries were made, and the agreed price or value of the coal and the amounts of moneys laid out and expended in connection therewith (Record, pages 15 to 21).

Also annexed to the complaint is a schedule showing payments by and allowances credited to the defendant and the dates thereof (Record, page 21-A).

The answer and the bill of particulars served by the defendant pursuant to demand duly made, admit the sale

and delivery of the goods, the expenditure of moneys in connection therewith, the value of the coal and the credits set forth in the schedules annexed to the complaint, but the answer

1. Alleges that before and after the dates of the transactions referred to there were other dealings between the parties, and that the defendant made other payments and was entitled to other allowances and deductions to an amount in the aggregate greater than the balance claimed due by the plaintiff.

2. Alleges by way of counterclaim damages for a breach of other contracts made or assumed by the Interstate Coal Company to the amount of $9,999.10, of which damages a schedule showing the items thereof is annexed to the answer (Record, pages 23-31, folios 67-93).

The reply to the counterclaim is a general denial thereof (Record, page 32, folios 94-96).

Under the pleadings (including the bill of particulars) the only issues to be tried therefore are:

1. Is the defendant entitled to any greater credits than conceded by the plaintiff, and if so, how much.

2. Were there other contracts entered into or assumed by the Interstate Coal Company. If so, were they broken by it, and what were the damages for such breach.

After the joinder of issue, upon the application of the defendant and against the opposition and objection of the plaintiff (Record pp. 67-68, folios 199-204), the District Court made an order appointing Wallace Macfarlane, Esq., an attorney-at-law, auditor with the following instructions and powers:

1. To make a preliminary investigation as to the facts.

2. To hear the witnesses.

3. To examine the accounts of the parties and make and file a report in the office of the Clerk of the District Court with a view to simplifying the issues for the jury, but not to finally determine any of the issues in the action; the final determination of all issues of fact to be made by the jury on the trial, and

4. To compel the attendance of and administer the oaths to witnesses.

The expenses of the auditor, including the expense of a stenographer, it was directed, are to be paid by either or both parties to the action in accordance with the determination of the Trial Judge.

It was further ordered that the auditor shall separately report as to the issues of fact the following especially:

1. All deliveries of coal alleged to have been made by the Interstate Coal Company to the defendant which are not disputed and the agreed prices therefor (including the towing and trimming charges).

2. All payments alleged to have been made for coal delivered by the Interstate Coal Company to the defendant, which are not disputed by the plaintiff.

3. All deliveries of coal alleged to have been made by the Interstate Coal Company to the defendant which are disputed and the agreed prices therefor (including towing

and trimming charges) with his opinion as to each of such disputed items.

4. All payments alleged to have been made by the defendant for coal delivered by the Interstate Coal Company to the defendant which are disputed by the plaintiff, with his opinion as to each of such disputed items.

5. The various charges for freight and demurrage which the defendant claims to have been obliged to pay for the account of the Interstate Coal Company, the items thereof admitted by the plaintiff to be chargeable and the items in dispute, with his opinion as to each of such disputed items.

6. The various penalties, commissions, cash discounts and other deductions which defendant claims to be entitled to deduct from the invoice price of the various shipments, the items thereof which are admitted by plaintiff as proper deductions and the items in dispute, with his opinion as to each of such disputed items.

7. His opinion as to the net amount due on each invoice of coal sold and delivered to defendant.

8. All deliveries of coal alleged to have been made by the Interstate Coal Company to the defendant which are claimed by the defendant to have differed upon analysis from the requirements of the City of New York, with his opinion as to each of such items.

9. All settlements claimed by the defendant to have been made between the Interstate Coal Company and the defendant whereby deductions were allowed by the plain-

tiff because the coal differed upon analysis from the requirements of the City of New York, and whereby other deductions were allowed by the plaintiff, with his opinion as to each of such allowances.

10. The amounts and kinds of coal alleged to have been sold to defendant by the A. H. Dollard Coal Sales Company (as set forth in folio 11 of the amended answer) under contracts which were later assigned to and assumed by the Interstate Coal Company; the amounts of coal alleged to have been delivered under said contracts; the sums of money alleged to have been paid by defendant in the open market in order to replace the coal not delivered under said contracts in order to fulfill contracts for the resale of the coal contracted for; the penalties which defendant alleges he was obliged to pay because the coal so purchased in the open market did not conform to the requirements of the City of New York; the amounts which defendant alleges he was obliged to pay to Burns Bros. in order to reimburse them for the excess cost of delivering some of the coal so purchased by defendant in the open market to one of the aforesaid City Hospitals over the price at which he had contracted to sell it so delivered: all items of damage which defendant alleges he suffered by reason of the non-delivery of the coal under the aforesaid contracts with the A. H. Dollard Coal Sales Company, with his opinion as to each of the foregoing items (see Record pages 70-74, folios 208-221).

Prior to the making of this order the cause had been reached for trial on the Trial Calendar of the District Court and had by consent been "reserved generally." Under the rules a cause so reserved may be restored for

trial on the motion of either party on two days' notice, and the plaintiff after the entry of the order referred to moved to restore the cause to the calendar for a trial before a jury (Record, page 75, folios 223-224).

The motion was denied by the HONORABLE AUGUSTUS N. HAND, the District Judge then presiding, and an order entered directing that all proceedings in regard to putting the case on the calendar for trial be stayed until the coming in of the report of the auditor (Record page 76, folios 226-228).

Thereupon the plaintiff presented an application to this Court asking leave to file a petition for a writ prohibiting the auditor and the defendant from proceeding under said order appointing the auditor and/or a writ of mandamus directed to the District Judge who may be at the time holding the Trial Term of the District Court commanding him to restore the cause to the Trial Calendar for trial in the regular way before a jury, and for such other relief as may be deemed proper (Record, pages 1-4, folios 1-11).

This Court allowed the petition to be filed and made the order to show cause by which the proceeding now comes before this Court.

POINT I.

The order appointing the auditor is in direct conflict with the Seventh Amendment to the Constitution and the Acts of Congress regulating trials of actions at law in the Federal courts and altogether without power and void.

First: The action in which the order was made is the usual one for goods sold and delivered and for moneys paid, laid out and expended. The defense interposed by the answer and bill of particulars served admits all of the items of goods sold and moneys paid out as claimed by the plaintiff, but sets up additional credits and offsets claimed by the defendant and a counterclaim for damages alleged to have been suffered by the defendant by a breach of contract entered into or assumed by the Interstate Coal Company. The only relief asked either by the plaintiff or by the defendant is by way of money damages. No breach of a fiduciary or trust relation is claimed and no inadequacy of legal remedy is alleged. The action is wholly one at law involving simple questions of fact.

Second: By the SEVENTH AMENDMENT to the CONSTITUTION, it is provided:

> "In suits at common law where the value in con-
> "troversy shall exceed $20 the right of trial by jury
> "shall be preserved, and no fact tried by a jury
> "shall be otherwise re-examined in any court of the
> "United States than according to the rules of the
> "common law."

In accordance with this Constitutional provision, Congress has prescribed how trials in actions at law in the Federal Courts shall be had.

By SECTION 648 U. S. R. S. (U. S. Compiled Statutes 1901, page 525) it is provided:

> **"The trial of issues of fact in the Circuit Courts "shall be by jury except in cases of equity and of "admiralty and maritime jurisdiction and except "as otherwise provided in proceedings in bankruptcy "and by the next section."**

By SECTION 649 U. S. R. S. (U. S. Compiled Statutes 1901, page 525), it is provided:

> "Issues of fact in civil cases in any Circuit Court "may be tried and determined by the Court without "the intervention of a jury whenever the parties or "their attorneys of record file with the clerk a stipu-"lation in writing waiving a jury. The finding of "the court upon the facts which may be either gen-"eral or special shall have the same effect as the "verdict of a jury."

By SECTION 700 U. S. R. S. (Compiled Statutes 1901, page 570) it is provided:

> "When an issue of fact in any civil cause in a "Circuit Court is tried and determined by the Court "without the intervention of a jury, according to "Section 649 the rulings of the Court in the prog-"ress of the trial of the cause, if excepted to at the "time and duly presented by a bill of exceptions, "may be reviewed by the Supreme Court upon a "writ of error or upon appeal; and when the finding "is special the review may extend to the determina-tion of the sufficiency of the facts found to support "the judgment."

As to the mode of proof in the trial of common law actions, it is provided:

By SECTION 861 U. S. R. S. (Compiled Statutes 1901, page 661):

> "The mode of proof in the trial of actions at law "shall be by oral testimony and examination of wit- "nesses in open court except as hereinafter provided."

By SECTION 863 U. S. R. S. (Compiled Statutes 1901, page 661):

> "The testimony of any witness may be taken in "any civil cause pending in a district or circuit "court by deposition *de bene esse* when the witness "lives at a greater distance from the place of trial "than one hundred miles or is bound on a voyage "to sea, or is about to go out of the United States "or out of the district in which the case is to be "tried and to a greater distance than one hundred "miles from the place of trial before the time of "trial or when he is ancient and infirm * * * ."

By SECTION 866 U. S. R. S. (Compiled Statutes 1901, page 663):

> "In any case where it is necessary in order to pre- "vent a failure or delay in justice any of the Courts "of the United States may grant a *dedimus potesta-* "*tem* to take depositions according to common usage "* * * ."

These sections, it is said in the cases, constitute within themselves a perfect and complete system for the guide and government of the Federal Courts in the trial of civil causes.

Hodges v. *Easton,* 106 U. S. 408;
Baylis v. *Travelers Insurance Co.,* 113 U. S. 316;
Capital Traction Co. v. *Hof,* 174 U. S., 1.

Third: The hearing ordered before the "auditor" is neither a trial by jury, nor by the Court, nor by a referee, nor by an arbitrator, nor any other proceeding contemplated by the Constitution and the Acts of Congress for the disposition of common law cases. It obviously is not a trial by jury. "Trial by jury," as said by MR. JUSTICE GRAY, "in the primary and usual sense of the term at the common law and in the American Constitution is not merely a trial by a jury of twelve men before an officer vested with authority to cause them to be summoned and impanelled to administer oaths to them and to the constable in charge and to enter judgment and issue execution on their verdict; but it is a trial by a jury of twelve men in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and (except on equitable or a criminal charge) to set aside their verdict, if in his opinion it is against the law or the evidence" (174 U. S., 1, at page 8).

Nor is it a determination by the court without the intervention of a jury. Neither the parties nor their attorneys of record have filed with the clerk a stipulation in writing waiving a jury. On the contrary, the order was granted against the objection and protest of the plaintiff.

Nor is it a hearing before the "auditor" as an arbitrator or referee as such a proceeding must derive its whole efficacy from the consent of the parties.

Nor does it conform to the requirements of Section 861, U. S. R. S., that the mode of proof in trial of actions

at common law shall be by oral testimony and examination of witnesses in open court.

Nor is it a deposition *de bene esse* under Section 863 U. S. R. S. or a *dedimus potestatem* according to common usage under Section 866.

The proceeding, therefore, clearly is not one provided for by the Constitution or by the Acts of Congress for the disposition of an action at law.

But while it is a proceeding neither provided for nor contemplated by the Constitution and the Acts of Congress, the order attempts to make it nevertheless in the nature of a judicial proceeding. It authorizes the auditor to make a "preliminary investigation as to the facts, hear the witnesses and examine the accounts of the parties" and "to compel the attendance of and administer the oaths to witnesses." (Record, pages 71-72, folios 213-214.)

It is true the auditor is "not to finally determine any of the issues in this action" (page 71, folio 213); but in order to accomplish any purpose whatsoever the report of the auditor must at least be regarded as *evidence* (Opinion, HAND, J., Record page 59, folio 176). But as *evidence* it would be wholly incompetent as it was not procured or based upon oral testimony and examination of witnesses in open court and neither a deposition *de bene esse* nor a commission under a *dedimus potestatem*. At best it would be a record of the statements of persons before an officer unknown to the Federal law, to whom no statute gives the right to administer an oath, and for false swearing before whom no punishment could be imposed, to whose rulings on the evidence no exception could be taken that could legally be reviewed, and whose report would be without force or effect as evidence or for any other purpose.

Fourth: While it is not claimed in support of the order that the proceeding is expressly authorized by the Constitution or by the Acts of Congress, it is claimed that in the Federal Courts where a jury trial is a constitutional right in an action at law, an auditor's report can be used as an aid to the court and jury as a method of simplifying the issues.

In the present case there are no issues which need to be simplified for a proper hearing and determination before the Court and jury, or at least none which could not be simplified by a bill of particulars as well, if not better, than by a hearing before the auditor.

Annexed to and made a part of the complaint are Schedules A and B setting out in detail the dates of delivery, the boats by which the deliveries were made, the tonnage, kind and price of the coal delivered and the total amount claimed for each delivery (Schedule A, Record pages 15-21) and the dates, amounts, deductions, and total credits to which the defendant is entitled (Schedule B, Record, pages 21-21A).

By the bill of particulars served by the defendant, as an examination of Schedules 1 and 2 thereto annexed will show, or at least such fact can be proved by a person making a comparison between the schedules annexed to the complaint and the schedules annexed to the bill of particulars, EVERY ITEM OF COAL CLAIMED FOR IN THE COMPLAINT IS ADMITTED TO HAVE BEEN DELIVERED TO AND RECEIVED BY THE DEFENDANT AND EVERY PAYMENT ON ACCOUNT CONCEDED BY THE PLAINTIFF IS ADMITTED BY THE DEFENDANT.

Under the pleadings as framed, therefore, there is practically nothing for the plaintiff to prove because his entire claim stands admitted by the defendant. Even under the practice obtaining in the State of New York allow-

ing an action involving a long account to be referred, the present action could not be referred against the plaintiff's consent, because whether or not an action is referrable must be determined by the complaint itself, and as the entire claim made by the plaintiff is admitted by the defendant no action involving a long account is shown by the complaint.

So far as concerns the first separate and distinct defense set up in the answer (Record pages 24-25, folios 71-75) if the defendant is able to prove that by the terms of the contract under which the coal claimed for in the complaint was sold as well as of other coal sold by the Interstate Coal Company to the defendant, the former warranted that all the coal delivered should conform to the specifications and analyze according to the requirements of the City of New York and that in case it should not conform to such specifications and analysis, the defendant might deduct from the price thereof certain percentages of said price according to the degree in which such coal was found to differ from the City requirements, it would only be necessary for the defendant to show as alleged by it in PARAGRAPH IV of the amended answer (Record page 25, folio 74) that from time to time settlements were had between the Interstate Coal Co. and the defendant, upon which it was determined that the total amount of deductions to which defendant was entitled was $23,264.38. In other words, the defense alleged rests upon an account stated or an accord between the parties entitling the defendant to deductions to the amount claimed, and which, if proved, would avoid all necessity for an examination of a long account.

So far as concerns the second separate and distinct defense (Record pages 25 to 31, folios 75-93) only 23 sep-

arate items are involved, the proof of which could in no event be complicated or involve any great length of time.

But in any event the issues could as well be simplified by a further bill of particulars as by the hearing ordered before the auditor.

The issues of fact as to which the auditor is ordered to report are:

1. Deliveries of coal not disputed by the defendant and the agreed prices therefor.

2. Payments made by the defendant not disputed by the plaintiff.

3. Deliveries of coal disputed by the defendant and the agreed prices therefor.

4. Payments claimed by the defendant, disputed by the plaintiff.

5. Various charges for freight and demurrage claimed to have been paid by the defendant, and the items thereof admitted and disputed by the plaintiff.

6. Penalties, commissions, cash discounts and other deductions claimed by the defendant, and the items thereof admitted and disputed by the plaintiff. * * *

8. Deliveries of coal made to the defendant claimed by him to have differed upon analysis from the city requirements.

9. Settlements claimed by defendant to have been made between the Interstate Coal Co. and defendant whereby deductions were allowed by the company.

10. Amounts and kinds of coal alleged to have been sold to defendant by the Dollard Coal Sales Company under contracts assigned to and assumed by the Interstate Coal Company; amounts of coal alleged to have been delivered under said contracts, the sums of money alleged to have been paid by defendant in open market in order to replace the coal not delivered under said contracts in order to fulfill contracts for the resale of the coal contracted for; the penalties which the defendant was obliged to pay to the City of New York and to Burns Bros. and all items of damage which defendant alleges he suffered by reason of the non-delivery of the coal under aforesaid contracts (Order, Record pages 72-74, folios 214-221).

All of these matters are absolutely within, or at least must be presumed to be within the knowledge of the defendant and shown by his records and books of account and if by the schedules annexed to the complaint and the bill of particulars already served the items in controversy are not sufficiently set forth and specified, they can be supplemented by a further bill of particulars embracing the particular matters specified in the order appointing the auditor. No necessity for the appointment of an auditor, therefore, exists.

Fifth: If, however, the fact were otherwise, the order is wholly without power and altogether void.

Howe Machine Co. v. *Edwards,* 15 Blatchford, 402 (Fed. Cases, Vol. 12, No. 6784);
Sulzer v. *Watson,* 39 Fed. Rep. 414;
Swift & Co. v. *Jones,* 145 Fed. Rep. 489;
Ex-parte: *Clinton B. Fisk,* 113 U. S. 713.

In *Howe Machine* v. *Edwards* (supra), CIRCUIT JUDGE BLATCHFORD (later Mr. Justice Blatchford of this Court) held that a Federal court had no authority to refer a suit at common law to a referee for trial without the consent of both parties to the suit. After referring to the Seventh Amendment to the Constitution and to the Acts of Congress regulating trials of actions at law and the decisions thereunder, the learned Judge said:

> "Congress has no power, directly or indirectly, "to deprive a party without his consent of the right "to a trial by jury, which such amendment says shall "be preserved; * * * Such right has always been "studiously preserved and its waiver has always been "made to depend on the consent of the party."

In *Sulzer* v. *Watson* (supra), the action was on a book account in the Circuit Court for the District of Vermont, before JUDGES WALLACE and WHEELER. JUDGE WHEELER, denying the appointment of an auditor, said:

> "It is an action at law, although not in any form "known to the common law, and although courts of "equity have jurisdiction of some matters of ac- "count they never have had any of matters merely "in *assumpsit* which may be involved in an action "like this. These are called matters of account be- "cause they may be kept on books of account and not "by reason of any relation of trust between the "parties out of which the transactions might arise "such as courts of equity took cognizance of. The "adoption of forms and methods of procedure of the "States is to supply those which the laws of the "United States do not provide and those of the State "cannot take the place of those which the laws of the "United States have otherwise provided * * * . A "trial by jury in cases like this in this Court being "expressly provided for and required by the laws of

> "the United States, no other mode of trial can be "taken from the state procedure and substituted "for it without consent of the parties in the form "prescribed by those laws (citing cases). In this "case there can be no trial by auditors; therefore, "no auditors should be appointed."

In *Swift & Co.* v. *Jones* (supra), in the Circuit Court of Appeals, Fourth Circuit, the action was at law and grew out of an alleged breach of a contract of agency, the amount sued for being an alleged balance due to the plaintiffs on account of the agency. In reversing an order granted in conformity with the practice obtaining in the State of North Carolina, referring the case to a Special Master, who was authorized to hear the same and pass upon the issues of fact arising out of the pleadings and *report* his findings of fact to the court and upon whose report the Court rendered its judgment in favor of the defendant, it was said:

> "The State legislation of North Carolina in so far "as the same presents the method for the ascertain- "ment of the facts of the case under consideration "contrary to and inconsistent with the legislation of "Congress on the same subject, must and should give "way to the plain provisions of the Federal law. It "is the duty of the trial courts to adhere rigidly to "the enactments of Congress prescribed for their "Government, and the presumptions are all unfavor- "able to the waiver of the right to trial by jury "(*Hoges* v. *Easton*, 106 U. S. 408, 1 Sup. Ct. 307, "27 L. Ed. 169); and whenever cases are submitted "to them for trial without a jury it must plainly "appear that the waiver was made as prescribed by "the Acts of Congress (Hughes Fed. Jur. 363).
>
> "Moreover, the mode of proof prescribed for the "trial of common law cases by Section 861, Re- "vised Statutes, clearly indicates that such trials in "the Federal courts are only to be had before a jury

"or in open court. It is 'that the mode of proof in
"'the trial of an action at common law shall be by
"'oral testimony and examination of witnesses in
"'open court except as hereinafter provided'; and
"the sections referred to in the other provisos (Act
"March 9, 1892, Chapter C-14, 27 Stat. 7—U. S.
"Comp. St. 1901, page 664) relate to the taking of
"depositions *de bene esse* and the issue of commis-
"sions. (Hughes, 364, *supra.*) The question of fol-
"lowing the State practice in matters of reference to
"referees and auditors has quite frequently been un-
"der review by the Federal courts, and it may be
"said that the general trend of the decisions is to the
"effect that such statutes will not be followed and
"that in said courts trial by jury is the only pre-
"scribed method for the ascertainment of facts un-
"less the same be waived as contemplated by the Act
"except in cases of equity, admiralty and bankruptcy
"(citing cases)."

Directly in line with these cases is the decision of this Court *In the matter of Clinton B. Fisk* (supra). That proceeding was for a writ of *habeas corpus and certiorari* to the marshal of the Southern District of New York, in whose custody the petitioner was held under an order of the Circuit Court adjudging him guilty of contempt in refusing to submit to an examination before trial pursuant to the practice prescribed by the Code of Civil Procedure for the courts of that State. Holding that these sections did not apply to the Federal courts and that the Circuit Court was without power to make the order for the petitioner's examination before trial, and that it transcended its jurisdiction in fining him for contempt for his disobedience thereof, it was said by MR. JUSTICE MILLER:

"No one can examine these provisions for procur-
"ing testimony to be used in the Courts of the United

> "States and have any reasonable doubt that so far "as they apply they were intended to provide a sys- "tem to govern the practice in that respect in those "Courts. They are in the first place too complete, "too far reaching and too minute to admit of any "other conclusion. But we have not only this infer- "ence from the character of the legislation but it is "enforced by the express language of the law in "providing a defined mode of proof in those courts "and in specifying the only exceptions to that mode "which shall be admitted. This mode is 'by oral "'testimony and examination of witnesses in open "'court except as hereinafter provided':"

And after referring to Sections 861, 863 and 866 of the Revised Statutes relating to depositions *de bene esse* and under a *dedimus potestatem*, and pointing out that the proceeding under review was not authorized by those sections, the learned Justice continued:

> "These are the exceptions which the statute pro- "vides to its positive rule: that the mode of trial in "actions at law shall be by oral testimony and exam- "ination of witnesses in open Court. They are the "only exceptions thereinafter provided. Does the "rule admit of others? Can its language be so con- "strued? On the contrary, its purpose is clear to "provide a mode of proof in trials at law to the ex- "clusion of all other modes of proof, and because "the rigidity of the law may in some cases work a "hardship it makes exceptions of such cases as it "recognizes to be entitled to another rule, and it "provides that rule for those cases. Under one or "the other all cases must come. Every action at "law in a Court of the United States must be gov- "erned by the rule or by the exceptions which the "statute provides. There is no place for exceptions "made by state statutes. The court is not at liberty "to adopt them or to require a party to conform to

"them. It has no power to subject a party to such "an examination as this. Not only is no such power conferred, but it is prohibited by the plain language "and the equally plain purpose of the Acts of Con- "gress and especially the Chapter on Evidence of the "Revision."

These cases it is submitted are conclusive to the effect that the only mode of trial in actions in the Federal courts is prescribed by the Constitution and the Acts of Congress under it, and that no mode or method can be adopted for the production of evidence or for the trial of an issue of fact arising therein other than those specifically defined and prescribed. Whether therefore the present proceeding be considered as a trial, or as a reference to hear and report, or to procure evidence for submission on the trial before the Court and the jury is of no moment because it clearly is a proceeding which is neither in accordance with the method prescribed by the Constitution and the Acts of Congress under it, nor within any authorized exception thereto, and is wholly without power and altogether void.

POINT II.

The cases cited in support of the order by the Court below are either distinguishable on their facts or in direct conflict with the Constitution and Acts of Congress referred to.

All of the cases cited by the learned District Judge below, with the exception of *Davis* v. *St. Louis & S. F. Ry. Co.* (25 Fed. Rep. 786), rest upon the decision by the Cir-

cuit Court of Appeals for the First Circuit in *Fenno* v. *Primrose* (119 Fed. Rep. 801), sitting in the State of Massachusetts, in the courts of which State it is the usual and common practice to appoint an auditor to hear the evidence and make a report thereof prior to the trial of the action by the Court and jury. In none of the cases cited is any decision by this Court upholding the practice therein approved anywhere cited or referred to. On the contrary, as we believe, they are all directly opposed to the decisions by this Court.

In *Davis* v. *St. Louis & S. F. Ry. Co.* (25 Fed. Rep. 786), the action was brought in the Circuit Court for the District of Kansas, and an application was made by one of the parties for a reference on the ground that a long account was to be investigated, and opposed by the other on the ground that no reference was permissible under the Kansas Statutes. The objection to the order thus was not based on the ground that it was in violation of the Federal Constitution and Statutes, but that it was not of such a nature as authorized a reference under the Kansas Statute.

Circuit Judge Brewer (later Mr. Justice Brewer of this Court) pointed out that there were sixteen hundred and odd claims, each one of which would have to be proved separately, and in his judgment it involved the examination of a long account within the meaning of the Kansas Statute. No authority independent of the State statute was cited in support of his action and he based the order thereon and on what he said was the old common law practice in the English Courts, where the examination of a long account was involved, to refer such action to a referee to report on the facts. This statement, it was pointed out by

the learned District Judge in the Court below in the present case, was historically inaccurate as applied to an account arising out of a breach of contract where no fiduciary relation appears to have existed (Opinion, HAND, J., Record page 61, folio 183).

In *Fenno* v. *Primrose* (119 Fed. Rep. 801), the action was brought in the Circuit Court of the United States for the District of Massachusetts and the decision was made by the Circuit Court of Appeals for the First Circuit sitting in that State. From the report of the case it appears that the auditor was appointed on the Court's own motion, but it does not appear whether the appointment was made against the objection of either party. The point involved was as to the power of the Court to regulate the compensation of the auditor and to determine where the burden of such compensation should rest. It was expressly admitted that:

> "There is no Federal Statute authorizing the ref-
> "erence of an action at law to an auditor, nor is there
> "any statute providing for compensation by placing
> "the burden either upon the government or the par-
> "ties." (119 Fed. 801.)

but that:

> "A Federal court has the inherent right and power
> "in the absence of a Federal statute to direct a pre-
> "liminary investigation in a proper case and to des-
> "ignate a suitable person as an officer of the Court
> "to call the parties before him as a tentative tribu-
> "nal to simplify the items and issues in order that
> "the case may be intelligently presented to a jury."
> (119 Fed., page 803.)

In other words, that a Federal court has a right to order an examination preliminary to the trial for the pur-

pose of securing evidence for use upon the trial, a holding directly in opposition to the decision by this Court in *Ex parte Clinton B. Fisk* (supra). In support of the view that the power to appoint an auditor in a Federal court does not necessarily rest upon statutory provisions, the learned Judge writing the opinion cited the case of *Davis* v. *St. Louis & S. F. Ry. Co.* (supra), which power he said was a necessary incident of common law procedure (119 Fed. Rep., page 805), a statement, as pointed out by the learned Judge in the present proceeding, historically inaccurate as applied to an account arising out of the breach of contract where no fiduciary relation existed. Besides, it was made by a court sitting in a State in which the common practice authorized the appointment of an auditor preliminary to a trial—which fact must have influenced at least to some extent, the Court in holding that a like power is vested in the Federal courts.

In *Corporation of St. Anthony* v. *Houlihan* (184 Fed. Rep., 252), the action was also brought in the Circuit Court of the United States for the District of Massachusetts, and decided by the Circuit Court of Appeals in that State, in which, as said, the practice of appointing an auditor preliminary to a trial obtains. The order was made by the agreement of the parties and the question involved was whether or not the charges of the stenographer employed by the auditor could be taxed against the defendant. The decision was by a divided court. So far as the question of the right of the Federal courts to appoint auditors in actions at law and to allow their reasonable fees is concerned, the decision rested wholly on the previous decision by the same Court in *Fenno* v. *Primrose* (supra). That case, therefore, adds nothing to the authority of the previous decision.

In *Craven* v. *Clark* (186 Fed. Rep. 959) the action also was brought in the Circuit Court for the District of Massachusetts. It was held by the Circuit Court, citing the decisions in *Fenno* v. *Primrose* (supra), and *Corporation of St. Anthony* v. *Houlihan* (supra), that the practice of appointing an auditor as preliminary to a jury trial was so well established in the First Circuit that a single judge could not properly reverse it.

In *Vermeule* v. *Reilly* (196 Fed. Rep. 266), the action was brought in the District Court for the Southern District of New York, and it was held by DISTRICT JUDGE HOLT that while a Federal Court has no power to appoint a referee to hear and determine all the issues in an action at law, it may appoint an auditor to simplify the issues. In support of this proposition the learned District Judge cited the decision in *Fenno* v. *Primrose* (supra), and followed the rule there laid down without any independent examination of the authorities.

In *U. S.* v. *Wells* (203 Fed. Rep., 146), the action was in the District Court for the Eastern District of Tennessee and was brought by the United States for the benefit of creditors who had furnished labor and materials for the building of a post office being erected under contract with the United States. The parties to the cause filed a stipulation agreeing that the same might be referred to a Special Master or Commissioner to take and hear proof upon various issues and report thereon. The learned District Judge after reviewing the authorities stated that the general conclusions reached by him were,

1st. That in an action at law in a Federal court, the issues may be submitted to a referee by consent of the parties for determination as an arbitrator.

2nd. That even by the consent of the parties the court was not authorized to refer the issues to a referee or other person as an officer of the court and as a substitute for the trial of the issues of fact by a jury or the court, but

3rd. That the Court may either of its own motion or upon the motion of either of the parties, or by consent of the parties, refer the issues to a referee as an officer of the Court for the purpose of making a preliminary investigation in order to simplify the issues.

In support of the third proposition, the learned District Judge cited and relied upon the decision in *Fenno* v. *Primrose* (supra).

The whole line of cases, therefore, cited and relied upon by the Court below, with the exception of one (25 Fed. Rep. 786) rests upon the decision by the Circuit Court of Appeals for the First Circuit in *Fenno* v. *Primrose,* sitting in a State where it is the usual and common practice to appoint an auditor to hear the evidence and make a report thereon prior to the trial and which decision, we submit, is in direct conflict with the Seventh Amendment to the Constitution of the United States and the Acts of Congress regulating jury trials in actions at law, and should be disapproved and overruled.

POINT III.

A writ of mandamus or of prohibition is the proper remedy.

Upon application by the plaintiff to restore the case to the calendar for trial, it having been marked "reserved

generally," the learned District Judge presiding denied the motion and directed that all proceedings in regard to putting the case on the calendar for trial be stayed until the coming in of the report of the auditor appointed by the order in question (Record pages 75-76, folios 223-228). Under this order the plaintiff will be compelled to proceed with the hearing before the auditor and to suffer the delay occasioned by such hearing and the expense incurred thereby (Record page 72, folio 214).

In these circumstances, it is submitted, the order appointing the auditor should be dealt with now before the plaintiff is put to the delay and expense necessarily attending the hearing ordered and a mandamus or writ of prohibition should be issued directing the District Court to proceed and give to the plaintiff his right to a trial by jury.

In the Matter of Simons, 247 U. S. 231;
McClellan v. *Carland,* 217 U. S. 268;
Virginia v. *Reeves,* 100 U. S. 313;
Virginia v. *Paul,* 148 U. S. 107;
Ex Parte: Metropolitan Water Co., 220 U. S. 539.

POINT IV.

The application should be granted and a rule absolute issued for a writ of mandamus and/or of prohibition as prayed.

Respectfully submitted,

ABRAM J. ROSE
ANTHONY L. WILLIAMS
Counsel for Petitioner.

280 Orig'l.

Supreme Court of the United States

Ex parte:
IN THE MATTER
of
WALTER PETERSON, as Receiver of INTERSTATE COAL COMPANY, INC.,
Petitioner.

ORIGINAL

POINTS FOR RESPONDENT.

GEORGE ZABRISKIE,
of Counsel for Respondent.

DISPATCH PRESS, Inc., NEW YORK

Supreme Court of the United States

EX PARTE: IN THE MATTER *of* WALTER PETERSON, as Receiver of INTERSTATE COAL COMPANY, INC., *Petitioner.*	Original.

This proceeding originates in a Rule of this Court taken by Walter Peterson, as Receiver of the Interstate Coal Company, Inc., requiring that cause be shown by the Honorable AUGUSTUS N. HAND or the United States District Judge for the Southern District of New York who may be at the time holding Trial Term of the United States District Court in said District why the prayer of the petition should not be granted. The prayer in substance is for a writ of prohibition against Arthur Sidney Davison, defendant in an action in the District Court in which the petitioner is plaintiff, and against Wallace Macfarlane, who by an order of the District Court October 27, 1919, was appointed auditor to examine and report upon accounts between the parties, prohibiting them from proceeding under that order, and/or a writ of mandamus directed to Judge HAND or other District Judge commanding him to restore the cause to the Trial Calendar for trial in the regular and usual way (fol. 10).

The petition (fol. 1), in connection with the exhibits attached to it, shows that the Receiver's action is for coal sold and delivered by the Coal Company in which the damages are laid at $21,014.43 and interest.

The Complaint includes a detailed account (Schedule A, following p. 14 of the record), which sets out 95 shipments of coal for which the aggregate selling prices, and towing and trimming charges, amount to $84,533.86, and credits the defendant with 50 items of payments, allowances and deductions, amounting to $63,519.43.

The defendant's *Answer* (fol. 67) pleads, in effect, the general issue, and a setoff, and a counterclaim. The setoff is founded upon an alleged breach of warranty by the Coal Company as vendor with respect to much of the coal, and consequent deductions to which the defendant claims to be entitled, which would reduce the plaintiff's claim, upon computation of the figures stated, to $1,478.52. The counterclaim grows out of alleged breaches of three other contracts made by A. H. Dollard Coal Sales Company with the defendant, and assigned to and assumed by the Coal Company, to supply coal for a specified purpose, and resulting damage to the defendant amounting to $9,999.10.

The plaintiff's *Reply* to the counterclaim is a general denial (fol. 94).

The defendant's *Bill of Particulars* (fol. 148) contains two schedules. The first comprises 123 items, the second 30. With respect to these, Mr. Gray's affidavit on which the motion was made for the appointment of an auditor (fol. 106), shows that, for the purpose of establishing the defense to the action, irrespective of the setoffs or counterclaims, it will be necessary to offer evidence regard-

ing 123 shipments of coal, 79 payments, 83 penalty items, 120 commissions and cash deduction items, and 10 freight and demurrage items.

The Schedule annexed to the Complaint shows, with respect to each of the 95 items, particulars contained in six columns. In the first is the date; in the second is the name of the boat; in the third, its tonnage; in the fourth, the kind of coal; in the fifth, the price and terms (Alg. or F. O. B.), besides, in many instances, charges for towing, for trimming, or both; and in the sixth column, the total amount of the claim.

The first Schedule of defendant's bill of particulars contains the 123 items referred to in the affidavit; and the details of these items are listed in nine columns.

Upon this state of the pleadings, and the affidavit already referred to, the defendant moved the Court to appoint "some suitable person as auditor to make a preliminary investigation in order to simplify the issues involved herein, so that they may be more intelligently presented to the jury, and directing him to hear the parties and any witnesses that may be produced and make a report thereon to the Court, giving him power to employ a stenographer to take testimony; the expenses of said auditor and stenographer to be divided between the parties hereto"; and for other and further relief (*Notice of Motion,* fol. 100).

The affidavit of Mr. Rose, one of the plaintiff's attorneys, in opposition to the motion, states proceedings in the action, and suggests "that this is an action at law in which the plaintiff is entitled to a jury trial both as to the claim, which can be proved in a very short time, because it is practically all admitted, and also as to the counterclaim, which

the plaintiff has denied." And he submits that "there is no power in this Court to order the matter referred to an auditor or referee or to in any way deprive the plaintiff of his right to a trial by jury" (fols. 133, 134).

The motion was heard in the District Court (Hon. AUGUSTUS N. HAND, *J.*), and an order was made October 27, 1919 (fol. 199), appointing an auditor, Mr. Wallace Macfarlane, with instructions to "make a preliminary investigation as to the facts, hear the witnesses, examine the accounts of the parties, and make and file a report in the office of the Clerk of this Court, with a view to simplifying the issues for the jury, but not to finally determine any of the issues in this action, the final determination of all issues of fact to be made by the jury on the trial, and the auditor to have power to compel the attendance of and administer the oaths to witnesses; the expenses of the auditor, including the expense of a stenographer, to be paid by either or both the parties to this action in accordance with the determination of the trial judge" (fols. 213, 214). The order further directed the auditor to report separately as to the issues of fact upon ten subjects set forth in the order, with his opinion upon each.

His Honor the Judge delivered an opinion (fol. 163) in which he said:

> "The items in dispute are very numerous. I am convinced from reading the affidavits that the trial of this case will involve a consideration of so many separate issues of fact that a jury will under any circumstances have constant difficulty in remembering and passing upon the issues involved. The contention of plaintiff's counsel that the facts are largely admitted ignores over 200 items which the de-

> fendant proposes to attempt to establish by way of defense. Without a preliminary investigation the situation will be likely to be almost intolerable for the Court, and the jury might become so confused as to reach its verdict largely by guesswork. This is the kind of case where a preliminary report by a skilled auditor will be of substantial service. The practice is approved and is under proper conditions most desirable" (254 Fed., 625).

His Honor refers to cases in the federal courts sanctioning the practice and to the practice in New York under the Code of Civil Procedure. It is shown that in New York the appointment of auditors or referees to examine long accounts has been in use since 1768, exclusive of actions of account, which always have been used both in New York and in England.

The practice, as shown by his Honor, has been established in the First Circuit by the Circuit Court of Appeals in the case of *Fenno* v. *Primrose,* 119 Fed., 801; has been followed in the Second Circuit in the case of *Vermeule* v. *Reilly,* 196 Fed., 226; and approved in the Sixth Circuit, in the case of *United States* v. *Wells,* 203 Fed., 146.

The rule to show cause is addressed only to the District Judge, against whom no writ of prohibition is sought, but only a writ of mandamus. The writ of prohibition asked for in the petition is designed to run only against the auditor and the defendant. Whether it can properly be granted against them, or can only be granted against the Court or the Judge, might be arguable; but as the same principles affect, so far as concerns the case at bar, both writs, it may suffice to argue those principles, without dwelling specially upon the persons against whom prohibition will lie.

FIRST POINT.

The jurisdiction of this Court.

Although the federal courts and the bar in New York would welcome the judgment of this Court upon the question which the petitioner seeks to raise here, yet the preliminary point of jurisdiction stands out so conspicuously on the record that it cannot with propriety be passed over in silence.

It is understood that the authority of this Court which the petitioner invokes is derived from Section 262 of the Judicial Code:

> "The Supreme Court and the District Courts shall have power to issue writs of *scire facias*. The Supreme Court, the Circuit Courts of Appeals and the District Courts shall have power to issue all writs not specifically provided for by statute which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law."

It is obvious that Section 234 of the Judicial Code has no application to the present case:

> "The Supreme Court shall have power to issue writs of prohibition to the District Courts when proceeding as courts of admiralty and maritime jurisdiction; and writs of mandamus in cases warranted by the principles and usages of law to any courts appointed under the authority of the United States, or to persons holding office under the authority of the United States, where a state or an ambassador or other public minister, or a consul or vice-consul is a party."

The question, then, is whether the writs asked for in this case are necessary for the exercise of the

jurisdiction of this Court and agreeable to the usages and principles of law.

As the action is pending in the District Court, and is not within the original jurisdiction of this Court, the inquiry is narrowed to the question whether the writs are necessary for the exercise of its appellate jurisdiction.

Marbury v. *Madison*, 1 Cr., 137.

I. No appeal is pending; and as the petition admits (fol. 10), the order of the District Court is not appealable.

II. Where no appeal is pending the power of this Court to issue a writ of mandamus in aid of its appellate jurisdiction appears to be confined to cases where such jurisdiction might otherwise be defeated by the unauthorized action of the Court below.

McClellan v. *Carrer*, 217 U. S., 268.

In the case cited the Court below had refused to hear the cause until another case between the parties pending in a State Court in which the same issues were involved should have been determined. They would thus become *res adjudicata* in the District Court, and the merits would not be open to review upon an appeal to this Court. Accordingly this Court granted a mandamus to the District Court requiring it to hear the case.

On the same principles this Court required the Court below to hear the case instead of transferring to the equity side, which is practically another court, in *Matter of Simons*, 247 U. S., 231, cited by the petitioners.

III. Neither mandamus nor prohibition can be employed as a substitute for error: which is the case here.

In re James Pollitz, 206 U. S., 323;
In re Atlantic City R. R., 164 U. S., 633;
Ex parte Gordon, 2 Hill, 363.

IV. It is not disputed that the District Court has jurisdiction of the parties and of their controversy. If the Court below has jurisdiction to determine the question presented mandamus will not lie.

Ex parte Gruetter, 217 U. S., 586;
Ex parte Harding, 219 U. S., 363.

Nevertheless this Court may review an extraordinary abuse of discretion where there is no other remedy.

Virginia v. *Rives*, 100 U. S., 313;
Virginia v. *Paul*, 148 U. S., 107;

—or where the parties or the subject matter are clearly not within the jurisdiction of the inferior Court.

Ex parte Wisner, 203 U. S., 449;
In re Winn, 213 U. S., 458.

The order of reference does not deprive the defendant of a trial of the issues of fact by a jury, but expressly retains it.

V. The plaintiff has an adequate remedy if in the end he deem himself aggrieved by the judgment which may be rendered after a trial of the facts by a jury.

Should the auditor proceed under the order of the District Court to perform the duties assigned

to him and make his report, and should such report be offered in evidence or otherwise used upon the trial, the plaintiff can protect his rights by exceptions which will be subject to review by the Circuit Court of Appeals on writ of error, and the judgment of that Court might be brought under review in this Court by certiorari.

In re Garrosi, 229 Fed., 363.

SECOND POINT.

The District Court had power to make the order in question.

That which the petition to this Court challenges is the method adopted by the Court below to ascertain what the issues are which the jury will have to try by a preliminary examination of the accounts out of which they arise, and an orderly arrangement of facts, so far as they are embodied in the accounts. It is, in short, a matter of procedure devised to further the convenience of the Court and the jury in trying the issues.

I. The constitutional guaranty upon which the plaintiff is understood to rely is contained in the Seventh Amendment to the Constitution of the United States, which provides:

> "In suits at common law where the value in controversy shall exceed $20, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."

The statute in point provides that

> "The trial of issues of fact in the District Courts, in all cases except cases in equity and cases or admiralty jurrisdiction, and except as otherwise provided in proceeding in bankruptcy, shall be by jury" (R. S., §566).

The meaning of the constitutional guaranty is, that the Seventh Amendment does not attempt to regulate matters of pleading or practice or to determine in what way issues of fact are to be submitted to a jury; and its aim is to preserve, not mere matters of form or procedure, but matters of substance and right.

> *Walker* v. *Southern Pacific R. R.*, 165 U. S., 593, 596;
> *Capital Traction Co.* v. *Hof*, 174 U. S., 1.

The case last cited involved more than $20 and originated in a justice's court, and the question was whether a trial by the justice and a jury in a manner not known to the common law, deprived the defendant of his constitutional right to a trial by jury. The subject was considered at large, and this Court held that, because on appeal the defendant would be entitled to a re-examination of all the issues by a jury, no constitutional right was violated by trying the issues first in the justice's court.

The only objection which has been made by the plaintiff is the suggestion that a hearing before the auditor would be a violation of rights guaranteed to the plaintiff by the Constitution of the United States; and the further suggestion that the order postpones the trial until after the termination of the proceeding before the auditor. If the first ob-

jection be not well taken it is evident that the second falls with it.

II. The order is justified by its approximation to the New York practice.

1. Procedure in actions at law in the federal courts is regulated, so far as concerns the question involved in the present case, by Section 914 of the Revised Statutes:

> "The practice, pleadings and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts shall conform as near as may be to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of court to the contrary notwithstanding."

The conformity required by the statute is as near as may be practicable.

> *Indianapolis, etc., R. R. Co.* v. *Horst*, 93 U. S., 291, 301.

The pertinent rule of the District Court in the Southern District of New York on this subject follows the statute, and provides:

> "In all cases not provided for by the rules of this Court, causes at common law shall proceed as nearly as may be in accordance with the law for the time being of the State of New York and the practice thereunder of the Supreme Court of said State" (Common Law Rule VI).

2. Under the New York Code of Civil Procedure the whole of the issues in this action, if the cause were pending in a State Court, would be sent to be

tried before a referee. The pertinent part of Section 1013 reads as follows:

> "The Court may, of its own motion, or upon the application of either party without the consent of the other, direct a trial of the issues of fact by a referee where the trial will require the examination of a long account on either side, and will not require the decision of difficult questions of law."

Actions for goods sold and delivered which involve long accounts are referable under the New York practice.

> *Welsh* v. *Darragh*, 52 N. Y., 590;
> *Sage* v. *Shepard & Morse Lumber Co.*, 76 Hun, 134;
> *Cochrane Carpet Co.* v. *Howells*, 86 Hun, 243.

So, an action to recover for a large number of shipments of coal is referable.

> *Ellsworth Collieries Co.* v. *Penn. R. R. Co.*, 94 Misc. (N. Y.), 659;
> *Vega Co-operative Assn.* v. *Craft*, 180 App. Div., 267.

An action is referable where the defendant disputes the account on which the plaintiff relies.

> *Irving* v. *Irving*, 90 Hun, 422; 149 N. Y., 573.

Such references are sanctioned by the Constitution of New York, which provides:

> "The trial by jury, in all cases in which it has been heretofore used, shall remain inviolate forever" (Art. I, Sec. 2).

And the reference of actions involving long accounts quite apart from the common law action of account, was in use in New York before the adoption of the first constitution in 1777.

Steck v. *Colorado Fuel & Iron Co.*, 142 N. Y., 236.

3. The question then is, how near can the District Court, in an action involving the examination of long accounts, approach to the procedure of the State Court in a like case? It is submitted that short of taking from the jury the trial of the issues of fact under the instructions of the Judge, the Court may go as far as convenience requires.

In the case at bar it has not been attempted to supplant the jury by the auditor. All that has been attempted is to make a preliminary investigation as to the facts, hear the witnesses, examine the accounts and report to the Court with a view to simplifying the issues for the jury; "but not to finally determine any of the issues in this action; the final determination of all issues of fact to be made by the jury" (fol. 213).

Such an approach to the New York procedure is not only sanctioned by the letter and the spirit of the statute and the rule of Court, but, further, is required in order to do justice between the parties. An inspection of the pleadings in the light of Judge HAND'S opinion demonstrates that it is indispensable in some way to collate the issues, and to examine and criticise the various complex items of account and the vouchers which support them.

III. In at least three other Circuits the Courts of the United States have followed the State practice of appointing referees to examine accounts,

reserving the issues of fact for trial by jury, as the opinion of the learned Judge who made the order here in question fully exhibits.

Fenno v. *Primrose,* 119 Fed., 801 (Mass.);
Craven v. *Clark,* 186 Fed., 959 (Mass.);
United States v. *Wells,* 203 Fed., 146 (Tenn.).

In the Tennessee case the reference was on consent, but the learned Judge (SANFORD) based such a reference upon the inherent power of the Court and approved the practice as established in the first Circuit.

The same practice has also been followed in an earlier case in New York.

Vermeule v. *Reilly,* 196 Fed., 226.

In the District of Columbia the same practice prevails, based upon a Maryland Statute of 1785 (Ch. 80, Sec. 12), and formulated in a careful rule of Court which makes the auditor's report final unless excepted to, and provides for trial by jury of the issues of fact presented by the exceptions.

Simmons v. *Morrison,* 13 App. D. C., 161.

IV. The examination of accounts by auditors is no encroachment upon the right of trial by jury.

That system of trial had been recognized as a part of the common right of all subjects by Henry II, and had certainly existed under his four predecessors.

1 Stubbs, Const. Hist. 164 (4th ed., p. 659).

1. The approximation to the State practice which has been adopted in the case at bar is analogous in principle to the procedure in the com-

mon law action of account; and so it has been regarded in *Fenno* v. *Primrose* (*supra*).

That action originated in the common law, although it was enlarged and improved to some extent by statute in the reign of Queen Anne. It shows that without the aid of a statute the Courts had power to appoint auditors to scrutinize and state accounts.

Malone v. *Saints Peter and Paul's Church,* 172 N. Y., 269;
McMurray v. *Rawson,* 3 Hill, 59;
Locke v. *Bennett,* 7 Cush., 445.

The procedure in the action of account was first to try before a jury the issue whether the plaintiff was entitled to an account from the defendant. If the jury found a verdict *quod computet* for the plaintiff, then an auditor or auditors were appointed to take and state the account. Issues were framed before the auditors, comprising such matters of discharge or countercharge as were not issuable under the original writ, and these issues arising in the course of the audit were sent to be tried *toties quoties*; the issues of law before the Court, the facts before a jury. The auditors waited for their determination. There might be many trials during the progress of such an action. When all the issues were determined the report of the auditors stood for the judgment of the Court. As jurisdiction and procedure in Chancery developed on the one hand, and the action of assumpsit on the other, both were found more convenient than the action of account, and gradually superseded it; but the case in 3 Hill (*supra*) shows that it was in use in New York as late as 1842.

2. So auditors in Chancery are officers or agents of the Court, who examine and digest accounts for the decision of the Court. They do not decree, but prepare materials on which a decree may be made.

Field v. *Holland,* 6 Cr., 8.

The Court of Chancery was an outgrowth of the Court of Exchequer (2 Stubbs, Const. Hist. [4th ed.], pp. 288; 279-282); and the Barons of the Exchequer were the sovereign auditors of England (Viner's Abr., *Account,* R., 168n; 2 Inst., 381).

3. The object of examining and auditing an account anywhere is to ascertain whether there are any errors or mistakes in it, and hence the definition of the verb "to audit" is to examine, settle and adjust accounts, to verify the accuracy of the statement submitted to the auditing officer.

People v. *Green,* 5 Daly (N. Y. Com. Pl.), 194, 200.

4. The employment of auditors in the Court of Exchequer is shown by the statute of Westminster 2 (14 Edward I, A. D. 1285), ch. 11. It concerns "servants, bailiffs, chamberlains and all receivers which are accountable," and provides that:

> "Where the masters of such servants do assign them *auditors* to take their accounts and they be found in arrearages upon the account, all things being allowed that ought to be allowed, their bodies shall be arrested, and by the testimony of the *auditors* they shall be sent into the next gaol of the King in those parts, and shall be received by the sheriff or gaoler and imprisoned in iron under safe custody, and shall remain in the same prison at their own cost until they have satisfied their master fully of the arrearages."

The effect of this provision is to give the operation of a judgment to the auditor's settlement of the account, and to cast the defendant in execution upon the judgment. The statute allows an appeal to the Court of Exchequer, and goes on to say:

> "And in the presence of the Barons or such *auditors* as they shall assign the account shall be rehearsed and justice done to the parties, so that if he be found in arrearages he shall be committed to the Fleet."
>
> *Viner's Abr., Account,* R. 167.

Various details of procedure under this statute will be found at the place cited in Viner.

The references to the appointment of auditors in the first instance and again in the Court of Exchequer on appeal, and the absence of any provision for the trial of issues of fact before a jury, in this statute enacted seventy years after Magna Charta, suggests that the practice of examining accounts before auditors was no novelty, and probably had its origin far back in the common law; and so in fact it had.

5. The examination of accounts by auditors in the Court of Exchequer was in use at least as early as King Henry II.

> *Dialogus de Scaccario,* by Richard, son of Nigel, Treasurer of England and Bishop of London (*ed.* Oxford, 1902).

The Court was composed of (until the office lapsed) the Justiciar, the Chancellor, the Treasurer, and certain other high officers. These were assisted by clerks, whose duty, in cases of account, was to keep the records in the roll and by tallies;

and among other clerks by a *calculator*. They sat at a large table marked off by seven stripes and by cross lines, so that it looked like a chess-board (whence its name). In the middle of one side the *Calculator* sat, who made the complicated arithmetical calculations by means of counters piled in appropriate squares representing pence, shillings, pounds and certain multiples of pounds (*Dialogus*, I, v M., p. 75; *Introduction*, p. 46).

There were two sittings a year, one after Easter, and another at Michaelenas. At the Easter session the accounts of sheriffs were brought in, but were not settled, and were reserved until the next session, "*ut tunc diligenter in magno annuali rotulo singula per ordinem annotentur.*" However, notes were taken by the clerks for reference to the judges "*ut soluto scaccario illius termini de hiis discernant maiiores, ne quidem non facile propter numerosam sui multitudinem nisi scripto commendarentur occurrent.*" When the questions reserved were decided, then if the account were found satisfactory, "*in eadem linea scribitur 'et quietus est'*" (II, ii A; *pp.* 115-116). The judges set apart for consultation in an adjoining house called *Thalamus secretorum*: "*ad hunc accedunt Barones cum proponitur eis verbum ambiguum ad scaccarium de quo malunt seorsum tractare quam in auribus omnium. Maxime autem propter hoc in partem secedunt, ne compoti qui ad scaccarium fiunt impedietur*" (I, vii E, F).

When an account, *e. g.* of a sheriff, was being taken, "*nisi prius facto examine, debitisque de quibus summonitus est solutis, residere non debit ad compotum*" (II, iv E; p. 125).

Here are exhibited quite plainly the origins from which the action of account was afterwards de-

rived; and it is to be noted that until enlarged a little by statute that action lay only against bailiffs, stewards, receivers and persons so situated; just as at first in the King's Exchequer the accounts were brought in chiefly by sheriffs and by tenants of royal manors. The reason for such limitations appears to be that only persons so situated were then liable in account. Remedies against other persons, whose obligations were fixed, lay in debt (Prof. Langdell, in II *Harv. Law Review*, 243-257, cited in the Opinion of HAND, *J.*).

In the process of time there were officers of the Exchequer who were called *Auditores Comptorum Scaccarii.* In the reign of Edward II certain clerks were appointed to audit the foreign accounts. In earlier times accounts of some part of the revenue were usually audited either by some of the Justices or Barons, or by clerks as persons assigned *hoc vice* for the purpose by the King or the Treasurer and Barons.

> 2 Madox, Hist. of the Exchequer, c. XXIV §VII (2d *ed.*, London, 1769, p. 292).

Several cases are cited by the author, and among them some in which it is said that viewers came and made oath to the expenses.

The statute of Westminster 2 (*supra*) shows that the method of settling the King's accounts was in use elsewhere; and as the settlement in the Court of Exchequer had the effect of a judgment, upon which the delinquent accountant could be fined or imprisoned, so the statute gave a like effect to the settlement of such other accounts.

The method of computation employed by the *Calculator* in the Exchequer, previously indicated, was one of three in popular use later, and acquired the

name of *"the auditor's use,"* because it was the method used by the auditors in that court. (*The ground of Artes, teaching the work and practice of Arithmetic,* Robert Recorde, 1543; cited in Madox, *ubi supra*).

6. It is not expected that this excursion into the pleasant fields of legal antiquities should define the practice today either in the State courts of New York, or in the federal courts sitting within that State. As, however, the petitioner contends that the order of which he complains invades a common law right secured to him by the Constitution of the United States and by statute, this review of legal procedure for the examination of accounts by auditors at a time when that common law right was in full vigor, does tend to show that no incompatibility exists between that right and this procedure. It further reveals the common law as the source from which the procedure, which ever since has been followed in one form or another, arises; and it points to the conclusion that the persistent common law procedure does not impair a contemporaneous common law right.

7. It is not without interest to remark that the Supreme Court of New York is a continuation of the colonial Supreme Court, and except as modified by statute, possesses the powers of the Courts of King's Bench, Common Pleas, and Exchequer.

Matter of Steinway, 159 N. Y., 250;
Kanouse v. *Martin,* 3 Sandf., 653.

8. The habit of the New York Courts to avail themselves of the assistance of referees is further exhibited by section 1015 of the Code of Civil Procedure:

"The Court may likewise of its own motion or upon the application of either party without the consent of the other direct a reference to take an account and report to the Court thereon, either with or without the testimony, after interlocutory or final judgment, or where it is necessary to do so for the information of the Court; and also to determine and report upon a question of fact arising in any stage of the action, upon a motion or otherwise, except upon the pleadings."

While this provision is chiefly employed in suits in equity, it has always been the practice of the Supreme Court to order a reference where the Court had to dispose of a question of fact except upon the trial of a question of fact arising upon the pleadings in a civil or criminal action.

Matter of Lawson, 109 App. Div., 195.

In general, without the Code, the Court always had the right to refer to take proofs on matters upon which it desired fuller information before proceeding.

Dwight v. *St. John*, 25 N. Y., 203.

Hence it may not be extravagant to suppose that the disposition shown in that State to examine accounts before auditors or referees follows very ancient habits of procedure which began long before any statute regulated them.

THIRD POINT.

The petition should be denied, if this Court determine that it has jurisdiction; otherwise it should be dismissed.

GEORGE ZABRISKIE,
Of Counsel for the District Judge and for the Defendant.

280rig'l.

Supreme Court of the United States

EX PARTE

IN THE MATTER

of

WALTER PETERSEN, as Receiver of the INTERSTATE COAL COMPANY.

Answer.

To the Supreme Court of the United States:

Pursuant to a Rule granted by this Court on the petition of Walter Petersen, as Receiver of the Interstate Coal Company, requiring me or the United States District Judge for the Southern District of New York who may at the time be holding Trial Term of the United States District Court in said District, to show cause why the prayer of said petition should not be granted, I, the *Honorable Augustus N. Hand,* one of the United States District Judges for the Southern District of New York, do respectfully make answer:

An order was made by the United States District Court for the Southern District of New York, at a Stated Term thereof held by me October 27, 1919, in an action between *Walter Petersen, as Receiver of the Interstate Coal Company, Inc.*, plaintiff, and *Arthur Sidney Davison,* defendant, whereby, among other things, Wallace Macfarlane, Esq., was appointed Auditor for the purposes and subject to the instructions therein stated. The order and the affidavits and other proceedings read and considered

by the Court upon the motion are annexed to the petition upon which the Rule to Show Cause was granted by this Court, and the reasons upon which I made the order are set forth in my opinion, also annexed to the petition.

Further answering the Rule to Show Cause, I submit that Rule VI of Common Law Rules of the United States District Court for the Southern District of New York, provides as follows:

> "*Rule VI.—Conforming to New York Practice.*—In all cases not provided for by the Rules of this Court causes at common law shall proceed as nearly as may be in accordance with the law for the time being of the State of New York and the practice thereunder of the Supreme Court of said State."

Among other things the Code of Civil Procedure of the State of New York contains the following provision:

> "§1013. *Compulsory Reference for the Trial of Issues; In What Cases It May Be Made.*—The Court may of its own motion or upon the application of either party without the consent of the other direct a trial of the issues of fact by a Referee where the trial will require the examination of a long account on either side and will not require the decision of difficult questions of law. In an action triable by the Court without a jury a reference may be made as prescribed in this section to decide the whole issue or any of the issues, or to report the Referee's finding upon one or more specific questions of fact involved in the issue."

The Code contains this further provision:

> "§1015.—*Compulsory Reference Upon Questions Incidentally Arising.*—The Court may likewise of its own motion or upon the application of either party without the consent of the

other direct a reference to take an account and report to the Court thereon, either with or without the testimony, after interlocutory or final judgment, or where it is necessary to do so for the information of the Court; and also to determine and report upon a question of fact arising in any stage of the action upon a motion or otherwise, except upon the pleadings."

The Constitution of the State of New York contains the following provision in Article I, Section 2:

> "The trial by jury in all cases in which it has been heretofore used shall remain inviolate forever, but a jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law."

I further answer that I, the said District Judge, as in duty bound, hold myself ready to stand to and abide by such order as may be made by this Honorable Court in the premises.

New York, March 3, 1920.

AUGUSTUS N. HAND,
District Judge.

DISPATCH PRESS, Inc., NEW YORK

Nor is it a determination by the court without the intervention of a jury. Neither the parties nor their attorneys of record have filed with the clerk a stipulation in writing waiving a jury. On the contrary, the order was granted against the objection and protest of the plaintiff.

Nor is it a hearing before the "auditor" as an arbitrator or referee, as such a proceeding must derive its whole efficacy from the consent of the parties.

Nor does it conform to the requirements of Rev. Stats., § 861, that the mode of proof in trial of actions at common law shall be by oral testimony and examination of witnesses in open court.

Nor is it a deposition *de bene esse* under Rev. Stats., § 863, or a *dedimus potestatem* according to common usage under § 866.

The proceeding, therefore, clearly is not one provided for by the Constitution or by the acts of Congress for the disposition of an action at law.

It is true the auditor is "not to finally determine any of the issues in this action"; but in order to accomplish any purpose whatsoever the report of the auditor must at least be regarded as evidence, 254 Fed. Rep. 625. But as evidence it would be wholly incompetent, not being procured or based upon oral testimony and examination of witnesses in open court and being neither a deposition *de bene esse* nor a commission under a *dedimus potestatem*. At best it would be a record of the statements of persons before an officer unknown to the federal law, to whom no statute gives the right to administer an oath, and for false swearing before whom no punishment could be imposed, to whose rulings on the evidence no exception could be taken that could legally be reviewed, and whose report would be without force or effect as evidence or for any other purpose.

It is claimed that in the federal courts where a jury trial is a constitutional right in an action at law, an

auditor's report can be used as an aid to the court and jury as a method of simplifying the issues. In the present case there are no issues which need to be simplified for a proper hearing and determination before the court and jury, or at least none which could not be simplified by a bill of particulars as well, if not better, than by a hearing before the auditor. If, however, the fact were otherwise, the order is wholly without power and altogether void. *Howe Machine Co.* v. *Edwards*, 15 Blatchf. 402; *Sulzer* v. *Watson*, 39 Fed. Rep. 414; *Swift & Co.* v. *Jones*, 145 Fed. Rep. 489; *Ex parte Fisk*, 113 U. S. 713.

The cases cited in support of the order by the court below are either distinguishable on their facts or in direct conflict with the Constitution and acts of Congress referred to. Distinguishing: *Davis* v. *St. Louis & S. F. Ry. Co.*, 25 Fed. Rep. 786; *Fenno* v. *Primrose*, 119 Fed. Rep. 801; *Corporation of St. Anthony* v. *Houlihan*, 184 Fed. Rep. 252; *Craven* v. *Clark*, 186 Fed. Rep. 959; *Vermeule* v. *Reilly*, 196 Fed. Rep. 226; *United States* v. *Wells*, 203 Fed. Rep. 146.

A writ of mandamus or of prohibition is the proper remedy. *Ex parte Simons*, 247 U. S. 231; *McClellan* v. *Carland*, 217 U. S. 268; *Virginia* v. *Rives*, 100 U. S. 313; *Virginia* v. *Paul*, 148 U. S. 107; *Ex parte Metropolitan Water Co.*, 220 U. S. 539.

Mr. George Zabriskie for respondent.

Mr. Justice Brandeis delivered the opinion of the court.

This is a petition for a writ of mandamus and / or prohibition brought by Walter Peterson, receiver of the Interstate Coal Company, against the Honorable Augustus N. Hand, Judge of the District Court of the United States for the Southern District of New York. The facts and the specific relief sought are these:

Peterson had brought an action at law in that court against Arthur Sidney Davison to recover a balance of $21,014.43, alleged to be due for coal sold and delivered as shown by a long schedule annexed. The answer substantially admitted the items set forth in the schedule filed by plaintiff, but denied that it presented a full account of the transactions between the parties and alleged that there were other deliveries of coal and other payments which the defendant had made, and also that he was entitled to additional allowances. It further alleged, by way of counter claim, that the plaintiff was indebted to him for failure to perform its contracts for coal in the sum of $9,999.10. In response to a demand for a bill of particulars, defendant filed schedules containing more than two hundred items which he proposed to establish by way of defense.

Upon motion of defendant and against the objection of plaintiff, Judge Hand appointed an auditor (254 Fed. Rep. 625):

"With instructions to make a preliminary investigation as to the facts; hear the witnesses; examine the accounts of the parties, and make and file a report in the Office of the Clerk of this Court with a view to simplifying the issues for the jury; but not to finally determine any of the issues in this action; the final determination of all issues of fact to be made by the jury on the trial; and the Auditor to have power to compel the attendance of, and administer the oaths to, witnesses; the expense of the Auditor, including the expense of a stenographer, to be paid by either or both parties to this action, in accordance with the determination of the Trial Judge."

The auditor was further ordered to report on certain facts under ten classifications. The design of this was largely to separate items in dispute from those as to which there was no real dispute and, also, to set forth the detailed facts on which the specific claims made were rested;

but the auditor was also thereby required to express his opinion on disputed issues, thus:

"6. The various penalties, commissions, cash discounts, and other deductions which defendant claims to be entitled to deduct from the invoice price of the various shipments, the items thereof which are admitted by plaintiff as proper deductions, and the items in dispute, with his opinion as to each of such disputed items.

"7. His opinion as to the net amount due on each invoice of coal sold and delivered to defendant."

Thereupon, application was made here for leave to file this petition. It prays that Judge Hand and the auditor named be prohibited from proceeding under the order appointing him; and it prays also, that Judge Hand, or such other judge who may at the time hold the trial term of that court, be commanded to restore the case to the trial calendar and that the same be tried in the regular and usual way. Leave to file the petition was granted January 12, 1920, and an order to show cause issued. The petitioner insists that the District Court is without power to make the order appointing the auditor and that proceedings thereunder would violate the Seventh Amendment to the Federal Constitution.

First: Objection is made by respondent to the jurisdiction of this court. It is insisted that the District Court had jurisdiction of the parties and of the cause of action; that if the auditor should proceed to perform the duties assigned to him and his report should be used at the trial before the jury, the plaintiff could protect his rights by exceptions which would be subject to review by the Circuit Court of Appeals; and that the writs prayed for may not be used merely to correct errors. But if proceedings pursuant to the appointment of an auditor would deprive petitioner of his right to a trial by jury, the order should, as was said in *Ex parte Simons*, 247 U. S. 231, 239, "be dealt with now, before the plaintiff is put to the difficulties

and the Courts to the inconvenience that would be raised by" a proceeding "that ultimately must be held to have been required under a mistake." The objection to our jurisdiction is unfounded. We proceed, therefore, to the consideration of the merits of the petition.

Second: The question presented is one of power in the District Court. If, under any circumstances, it could appoint an auditor with the duties here prescribed without the consent of the parties, the facts clearly warranted such action in this instance. The plaintiff sued for a balance alleged to be due on an account annexed containing 298 items. The defendant set up another account containing 402 items. Included in the latter, besides certain charges against defendant for additional deliveries, were over 30 cash items of credit not allowed for in the plaintiff's account. These 402 items were alleged to arise out of 123 different deliveries of cargoes (or partial cargoes) of coal made on 91 different days during a period of eleven months. The coal delivered was of various kinds and the invoice prices for the same kind differed from time to time. In respect to most of these deliveries, there were claims for allowances by way of penalties, commissions and cash discounts; and, as to some, there were claims for allowances on account of freight.

The District Court found that in order to render possible an intelligent consideration of the case by court and jury it was necessary to appoint an auditor and confer upon him two functions. The first was to segregate those items upon which the parties agreed and to classify those actually in controversy; and thus, having defined the issues, to aid court and jury by directing their attention to the matters in dispute. The second function of the auditor was to form a judgment and express an opinion upon such of the items as he found to be in dispute. In order to perform these functions the auditor would be required not merely to examine books, vouchers and

other papers and to make computations, but to hear and pass upon conflicting testimony of the parties and of other witnesses. This full hearing, while obviously necessary to enable the auditor to form a trustworthy judgment on the disputed items, would serve also to narrow the field of controversy. For such a tentative trial acts as a sifting process by which misunderstandings and misconceptions as to facts are frequently removed. In the course of it many contentions or assumptions made by one party or the other are abandoned. Agreement is thus reached as to some of the facts out of which liability is alleged to arise, even when the items to which they relate remain in dispute. See *Fair* v. *Manhattan Insurance Co.*, 112 Massachusetts, 329.

The order expressly declared that the auditor should not "finally determine any of the issues in this action; the final determination of all issues of fact to be made by the jury on the trial;" but it did not provide affirmatively what use should be made of the report at the trial. It may be assumed that, if accepted by the court, the report would be admitted at the trial before the jury as *prima facie* evidence both of the evidentiary facts and of the conclusions of fact therein set forth. The report being evidence sufficient to satisfy the burden of proof (*Wyman* v. *Whicher*, 179 Massachusetts, 276) would tend to dispense with the introduction at the trial before the jury of evidence on any matter not actually in dispute. The appointment of the auditor would thus serve to shorten the jury trial, by reducing both the number of facts to be established by evidence and the number of questions in controversy. A more intelligent consideration of the issues submitted to the jury for final determination would result.

Third: Prior to the adoption of the Federal Constitution there did not exist in England, or so far as appears in any of the colonies, any officer, permanent or temporary,

who, in connection with trials by jury, exercised the powers of an auditor above described. An official called "auditor" had long been known as part of the judicial machinery in certain cases brought in the common-law courts both of England and of the colonies; but the functions of the auditor in those cases were different. In the common-law action of account auditors were appointed in England, from the earliest times, to take the account, after the interlocutory judgment *quod computet* had been entered. But the parties were entitled to a jury trial before the interlocutory judgment was rendered; and further issues of fact arising before the auditor were not passed upon by him, but were certified to the court for trial by a jury. The use of this form of action was limited to cases where the defendant was under obligation to account to the plaintiff as guardian, bailiff, or receiver of his property.[1] In Maryland, by Act of 1785, c. 80, § 12, the power of the court to appoint auditors was extended to all cases in which it might be necessary to examine and determine accounts; but the jury trial was not affected thereby, for the proceedings thereon were to be "as in cases of account."[2] In Connecticut auditors were appointed by the court in actions of "book debt"—and the same practice was early introduced in Vermont and other States; but in this action the report of the auditor, if accepted by the court, is a substitute for the jury and operates to determine the issues of fact.[3] In New York

[1] See Prof. Langdell, 2 Harvard Law Review, 241, 251–255; *Holmes* v. *Hunt*, 122 Massachusetts, 505, 512.

[2] See *United States* v. *Rose*, 2 Cranch C. C. 567; *Barry* v. *Barry*, 3 Cranch C. C. 120; *Bank of United States* v. *Johnson*, 3 Cranch C. C. 228. The report was not admitted before the jury as *prima facie* evidence of the truth of the statements or conclusions of the auditor. *McCullough* v. *Groff*, 2 Mackey (D. C.), 361, 366.

[3] *Sulzer* v. *Watson*, 39 Fed. Rep. 414; Connecticut General Statutes, § 5752 (ed. of 1918); Act of Vermont, October 21, 1782, Slade's Ver-

actions on long accounts are determined now, as in colonial days, by referees instead of by a jury.[1]

The office of auditor with functions and powers like those here in question was apparently invented in Massachusetts. It was introduced there by c. 142 of the Acts of the Legislature of the year 1818; and as a part of the judicial machinery it has received the fullest development in that State. No act of Congress has specifically authorized the adoption of the practice in the federal courts. We have therefore to decide, not only whether such appointment of auditors is consistent with the constitutional right of trial by jury, but also whether it is a power inherent in the District Court as a trial court.

Fourth: The command of the Seventh Amendment that "the right of trial by jury shall be preserved" does not require that old forms of practice and procedure be retained. *Walker* v. *New Mexico & Southern Pacific R. R. Co.*, 165 U. S. 593, 596. Compare *Twining* v. *New Jersey*, 211 U. S. 78, 101. It does not prohibit the introduction of new methods for determining what facts are actually in issue, nor does it prohibit the introduction of new rules of evidence. Changes in these may be made. New de-

---

mont State Papers, 456; *Hall* v. *Armstrong*, 65 Vermont, 421; Missouri, Wagner's Stat. 1041, § 18; *Edwardson* v. *Garnhart*, 56 Missouri 81.

[1] *Steck* v. *Colorado Fuel & Iron Co.*, 142 N. Y. 236. This fact has no bearing on the constitutional question involved here. The right to a jury trial guaranteed in the federal courts is that known to the law of England, not the jury trial as modified by local usage or statute. *United States* v. *Wonson*, 1 Gall. 5, 20; *Capital Traction Co.* v. *Hof*, 174 U. S. 1, 8; see also *United States* v. *Rathbone*, 2 Paine, 578; *Howe Machine Co.* v. *Edwards*, 15 Blatchf. 402; *Sulzer* v. *Watson*, 39 Fed. Rep. 414; *United States* v. *Wells*, 203 Fed. Rep. 146, 149.

In *Davis* v. *St. Louis & S. F. Ry. Co.*, 25 Fed. Rep. 786, a case involving a long account, a referee was appointed to report; apparently to determine the facts in accordance with the practice prevailing in Kansas where the court was sitting.

vices may be used to adapt the ancient institution to present needs and to make of it an efficient instrument in the administration of justice.[1] Indeed, such changes are essential to the preservation of the right. The limitation imposed by the Amendment is merely that enjoyment of the right of trial by jury be not obstructed, and that the ultimate determination of issues of fact by the jury be not interfered with.

In so far as the task of the auditor is to define and simplify the issues, his function is, in essence, the same as that of pleading. The object of each is to concentrate the controversy upon the questions which should control the result. *United States* v. *Gilmore*, 7 Wall. 491, 494; *Tucker* v. *United States*, 151 U. S. 164, 168. No one is entitled in a civil case to trial by jury unless and except so far as there are issues of fact to be determined. It does not infringe the constitutional right to a trial by jury, to require, with a view to formulating the issues, an oath by each party to the facts relied upon. *Fidelity & Deposit Co.* v. *United States*, 187 U. S. 315. Nor does the requirement of a preliminary hearing infringe the constitutional right, either because it involves delay in reaching the jury trial or because it affords opportunity for exploring in advance the evidence which the adversary purposes to introduce before the jury. *Capital Traction Co.* v. *Hof*, 174 U. S. 1. In view of these decisions it cannot be deemed an undue obstruction of the right to a jury trial to require a preliminary hearing before an auditor.

Nor can the order be held unconstitutional as unduly interfering with the jury's determination of issues of fact, because it directs the auditor to form and express an opinion upon facts and items in dispute. The report will, unless rejected by the court, be admitted at the jury trial as

[1] See "Trial by Jury and The Reform of Civil Procedure," by Prof. A. W. Scott, 31 Harvard Law Review, 669.

evidence of facts and findings embodied therein; but it will be treated, at most, as *prima facie* evidence thereof. The parties will remain as free to call, examine, and cross-examine witnesses as if the report had not been made. No incident of the jury trial is modified or taken away either by the preliminary, tentative hearing before the auditor or by the use to which his report may be put. An order of a court, like a statute, is not unconstitutional because it endows an official act or finding with a presumption of regularity or of verity. *Marx* v. *Hanthorn*, 148 U. S. 172, 182; *Turpin* v. *Lemon*, 187 U. S. 51, 59; *Reitler* v. *Harris*, 223 U. S. 437. In *Meeker* v. *Lehigh Valley R. R. Co.*, 236 U. S. 412, 430, it was held that the provision in § 16 of the Interstate Commerce Act making the findings and order of the Commission *prima facie* evidence of the facts therein stated in suits brought to enforce reparation awards, does not infringe upon the right of trial by jury. See also *Mills* v. *Lehigh Valley R. R. Co.*, 238 U. S. 473; *Chicago, Burlington & Quincy R. R. Co.* v. *Jones*, 149 Illinois, 361, 382. In the *Meeker Case* this court relied especially upon *Holmes* v. *Hunt*, 122 Massachusetts, 505, and called attention to the fact that there the statute making the report of an auditor *prima facie* evidence at the trial before a jury was held to be a legitimate exercise of legislative power over rules of evidence and in no wise inconsistent with the constitutional right of trial by jury.[1] The reasons for holding an auditor's report admissible as evidence are, in one respect, stronger than for giving such effect to the report of an independent tribunal like the Interstate Commerce

[1] Acts making findings in the tentative hearing before an auditor *prima facie* evidence were held not to infringe the right of trial by jury in Maine; *Howard* v. *Kimball*, 65 Maine, 308, 327; and in New Hampshire; *Doyle* v. *Doyle*, 56 N. H. 567; *Perkins* v. *Scott*, 57 N. H. 55. A different conclusion was reached in *Francis* v. *Baker*, 11 R. I. 103, and *Plimpton* v. *Town of Somerset*, 33 Vermont, 283.

Commission. The auditor is an officer of the court which appoints him. The proceedings before him are subject to its supervision, and the report may be used only if, and so far as, acceptable to the court.

That neither the hearing before the auditor, nor the introduction of his report in evidence abridges in any way the right of trial by jury was the conclusion reached in 1902 in the District of Massachusetts in *Primrose* v. *Fenno*, 113 Fed. Rep. 375; 119 Fed. Rep. 801, the first reported case in which an auditor was appointed with the powers here conferred. The practice there established has been followed in the Southern District of New York, *Vermeule* v. *Reilly*, 196 Fed. Rep. 226; and in the Eastern District of Tennessee, *United States* v. *Wells*, 203 Fed. Rep. 146.

Fifth: There being no constitutional obstacle to the appointment of an auditor in aid of jury trials, it remains to consider whether Congress has conferred upon District Courts power to make the order. There is here, unlike *Ex parte Fisk*, 113 U. S. 713, no legislation of Congress which directly or by implication forbids the court to provide for such preliminary hearing and report. But, on the other hand, there is no statute which expressly authorizes it. The question presented is, therefore, whether the court possesses the inherent power to supply itself with this instrument for the administration of justice when deemed by it essential.

Courts have (at least in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for the performance of their duties. Compare *Stockbridge Iron Co.* v. *Cone Iron Works*, 102 Massachusetts, 80, 87–90. This power includes authority to appoint persons unconnected with the court to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause. From the commencement of our Government, it has been exercised by the federal courts, when sitting in equity, by

appointing, either with or without the consent of the parties, special masters, auditors, examiners and commissioners. To take and report testimony; to audit and state accounts; to make computations; to determine, where the facts are complicated and the evidence voluminous, what questions are actually in issue; to hear conflicting evidence and make finding thereon; these are among the purposes for which such aids to the judges have been appointed. *Kimberly* v. *Arms*, 129 U. S. 512, 523. Whether such aid shall be sought is ordinarily within the discretion of the trial judge; but this court has indicated that where accounts are complex and intricate, or the documents and other evidence voluminous, or where extensive computations are to be made, it is the better practice to refer the matter to a special master or commissioner than for the judge to undertake to perform the task himself. *Heirs of P. F. Dubourg de St. Colombe* v. *United States*, 7 Pet. 625; *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Tompkins*, 176 U. S. 167, 180. Of the appointment made in *Field* v. *Holland*, 6 Cranch, 8, 21, Mr. Chief Justice Marshall said: "It is a reference to 'auditors,' a term which designates agents or officers of the court, who examine and digest accounts for the decision of the court. They do not decree, but prepare materials on which a decree may be made." And in *Railroad Company* v. *Swasey*, 23 Wall. 405, 410, Mr. Chief Justice Waite said of the master's report: "Its office is to present the case to the court in such a manner that intelligent action may be there had, and it is this action by the court, not the report, that finally determines the rights of the parties."

What the District Judge was seeking when he appointed the auditor in the case at bar was just such aid. He required it himself; because without the aid to be rendered through the preliminary hearing and report, the trial judge would be unable to perform his duty of defining to the jury the issues submitted for their determination and

of directing their attention to the matters actually in issue. *United States* v. *Philadelphia & Reading R. R. Co.*, 123 U. S. 113, 114. The hearing and report were also essential as shown above to enable the jury to perform their specific duty. Owing to the difference in the character of the proceedings and of the questions ordinarily involved, the occasion for seeking such aid as is afforded to a judge by special masters, auditors or examiners arises less frequently at law than in equity. A compulsory reference with power to determine issues is impossible in the federal courts because of the Seventh Amendment, *United States* v. *Rathbone*, 2 Paine, 578, but no reason exists why a compulsory reference to an auditor to simplify and clarify the issues and to make tentative findings may not be made at law, when occasion arises, as freely as compulsory references to special masters are made in equity. Reference of complicated questions of fact to a person specially appointed to hear the evidence and make findings thereon has long been recognized as an appropriate proceeding in an action at law. *Heckers* v. *Fowler*, 2 Wall. 123. The inherent power of a federal court to invoke such aid is the same whether the court sits in equity or at law. We conclude, therefore, that the order, in so far as it appointed the auditor and prescribed his duties, was within the power of the court.

Sixth: The clause in the order which provides that "the expense of the Auditor, including the expense of a stenographer, (to) be paid by either or both parties to this action, in accordance with the determination of the Trial Judge" requires special consideration. As Congress [1] has made

[1] In Massachusetts the expense of the auditor was prior to 1878 taxed in all cases as costs to be paid by the defeated party. See Acts of 1818, c. 142; Rev. Stats. (1836), c. 96, § 31; Gen. Stats. (1860), c. 121, § 50; Act of March 16, 1867, c. 67; Act of June 6, 1873, c. 342. By Act of April 23, 1878, c. 173, the expense of the auditor in cases tried in the Superior or in the Supreme Judicial Court was made payable by the

no provision for paying from public funds either the fees of auditors or the expense of the stenographer, the power to make the appointment without consent of the parties is practically dependent upon the power to tax the expense as costs. May the compensation of auditor and stenographer be taxed as costs; and, if so, may the expense be imposed in the discretion of the trial court upon either party?

Federal trial courts have, sometimes by general rule, sometimes by decision upon the facts of a particular case, included in the taxable costs expenditures incident to the litigation which were ordered by the court because deemed essential to a proper consideration of the case by the court or the jury. Equity Rule 68 provides for taxing the fees of masters and Rule 50 for the expense of a stenographer. Both rules embody substantially the practice which had theretofore prevailed generally in equity proceedings, and which in the Southern District of New York had been followed not only in equity, *American Diamond Drill Co.* v. *Sullivan Machine Co.*, 32 Fed. Rep. 552; 131 U. S. 428; *Brickill* v. *Mayor, etc., of City of New York*, 55 Fed. Rep. 565; *Hohorst* v. *Hamburg-American Packet Co.*, 76 Fed. Rep. 472; but also in admiralty, *The E. Luckenback*, 19 Fed. Rep. 847; *Rogers* v. *Brown*, 136 Fed. Rep. 813. The expense of printing the records and briefs in the trial court has been made by rule of court in

county. See also Rev. Laws (1902), c. 165, § 60; Act of June 5, 1911, c. 237; Act of 1914, c. 576.

In Maine the fees of the auditor were prior to 1897 taxed as costs in favor of the prevailing party. Laws (1821), c. 59, § 25; Acts of 1826, c. 347, § 1; Rev. Stats. (1883), c. 82, § 70. Since the Act of March 12, 1897, c. 224, the fees and necessary expenses of the auditors are paid by the county.

In New Hampshire the fees of the auditor are also taxable as costs in favor of the prevailing party; but the court may now, in its discretion, order them paid by the county. Act of June 23, 1823, c. 19, § 1; Act of July 20, 1876, c. 35, § 4; Pub. Stats. (1901), c. 227, § 7.

several of the circuits taxable as costs against the defeated party, *Hake* v. *Brown*, 44 Fed. Rep. 734. Compare *Kelly* v. *Springfield Ry. Co.*, 83 Fed. Rep. 183; *Tesla Electric Co.* v. *Scott*, 101 Fed. Rep. 524. As early as 1843 Mr. Justice Story, sitting at circuit in *Whipple* v. *Cumberland Cotton Manufacturing Co.*, 3 Story, 84, approved, in an action at law for damages, although not specially authorized by any rule, the order of a survey, as "necessary for the true understanding of the cause on both sides; " and ordered the expense paid by them. In cases in which courts have refused to tax as costs copies of stenographer's minutes and other expenditures incident to the litigation, attention has been called to the fact that they were made for the benefit of the party as distinguished from expenditures incurred under order of the court to make possible or to facilitate its consideration of the case. *Stallo* v. *Wagner*, 245 Fed. Rep. 636; *New Hampshire Land Co.* v. *Tilton*, 29 Fed. Rep. 764. But see *Bridges* v. *Sheldon*, 7 Fed. Rep. 17, 42.

The allowance of costs in the federal courts rests not upon express statutory enactment by Congress, but upon usage long continued and confirmed by implication from provisions in many statutes. Mr. Justice Woodbury in *Hathaway* v. *Roach*, 2 Woodb. and M. 63; Mr. Justice Nelson in *Costs in Civil Cases*, 1 Blatchf. 652; *The Baltimore*, 8 Wall. 377. In *Hathaway* v. *Roach*, p. 67, it is said to have been the usage of the federal courts "to conform to the state laws as to costs, when no express provision has been made and is in force by any act of Congress in relation to any particular item, or when no general rule of court exists on this subject." And in *The Baltimore*, pp. 390–391, this court stated that "the costs taxed in the Circuit and District Courts were the same as were allowed at that time in the courts of the State, including such matters as travel and attendance of the parties, fees for copies of the case, and abstracts for the hearing, compensation for the

services of referees, auditors, masters, and assessors, and many other matters not embraced in the fee bills, since passed by Congress." [1] Neither the Act of February 26, 1853, c. 80, 10 Stat. 161, Rev. Stats., § 983, nor any later act of Congress or rule of court deals expressly or by implication with the subject of taxing as costs the expense of an auditor. The practice, if any, governing in this respect the courts of New York would, therefore, be followed in the federal courts. See *Huntress* v. *Town of Epsom*, 15 Fed. Rep. 732. But, so far as appears, the preliminary hearing before an auditor in aid of jury trials is not a part of the judicial machinery of that State. The nearest analogy to it is the reference had in actions at law on long accounts as a substitute for a jury trial. The expense of the compulsory reference in such actions is so taxable. Code Civ. Proc., § 3256. As there is no statute, federal or state, and no rule of court excluding auditors' fees and the expense of his stenographer from the items taxable as costs, no reason appears why they may not be included, like other expenditures ordered by the court with a view to securing an intelligent consideration of a case.

Seventh: The further question is whether the District Court had power to make the expense of the auditor taxable in whole or in part against the prevailing party, if the trial judge should so determine. The advantages of such a flexible rule are obvious. But general principles governing the taxation of costs in actions at law followed by the federal courts since their organization, preclude its adoption.

While in equity proceedings the allowance and imposition of costs is, unless controlled by statute or rule of court, a matter of discretion, it has been uniformly held

[1] *Shreve* v. *Cheesman*, 69 Fed. Rep. 785, 789; see also *Scatcherd* v. *Love*, 166 Fed. Rep. 53; *Michigan Aluminum Foundry Co.* v. *Aluminum Co. of America*, 190 Fed. Rep. 903, 904.

that in actions at law the prevailing party is entitled to costs as of right: (compare *United States* v. *Schurz*, 102 U. S. 378, 407), except in those few cases where by express statutory provision or by established principles costs are denied.[1] It has also been generally held that this right to costs of the prevailing party in actions at law extends to the *entire* costs in the trial court, and that the court is without power to make an apportionment based upon the fact that the prevailing party has failed in a part of his claims or that for other reasons only a part or none of the costs should in fairness be allowed.[2] This rule of practice established by long usage is confirmed by the language of § 983 of the Revised Statutes. It would, therefore, be held to prevail over a rule, if any, to the contrary established in the courts of the State. But the practice in the courts of New York appears to be in this respect in entire harmony with that of the federal courts.[3] In *Whipple* v. *Cumberland Cotton Manufacturing Co.*, *supra*, the expense of the survey ordered by the court was imposed by it equally on the two parties; and the same disposition was made in *Primrose* v. *Fenno*, *supra*, where the auditor had been appointed at the instance of the court without objection by either party. But in *Houlihan* v. *Corporation of*

---

[1] For instance, Rev. Stats., § 968, denying costs to a plaintiff or petitioner who recovers less than $500.

[2] *Crabtree* v. *Neff*, 1 Bond, 554; *Hooe* v. *Alexandria*, 1 Cranch C. C. 98; *Bartels* v. *Redfield*, 47 Fed. Rep. 708; *Trinidad Asphalt Paving Co.* v. *Robinson*, 52 Fed. Rep. 347; *United States* v. *Minneapolis, etc., Ry. Co.*, 235 Fed. Rep. 951, 953; *West End St. Ry. Co.* v. *Malley*, 246 Fed. Rep. 625, 627; *Sears, Roebuck & Co.* v. *Pearce*, 253 Fed. Rep. 960, 962; *Wheeler* v. *Taft*, 261 Fed. Rep. 978.

[3] The general rule that in actions at law the prevailing party is entitled as of right to the taxable costs prevails in New York; and there is a further provision that when plaintiff demands a judgment for a sum of money only, the plaintiff, if prevailing, is entitled to the costs whether the suit be one at law or in equity. *Murtha* v. *Curley*, 92 N. Y. 359; *Norton* v. *Fancher*, 92 Hun, 463.

St. Anthony, 173 Fed. Rep. 496; 184 Fed. Rep. 252; where the auditor was appointed by consent of the parties, the same court taxed both the auditor's and the stenographer's fees against the losing party, holding that it had discretion, if it was not obliged to do so; and a petition for writ of certiorari was denied by this court; 220 U. S. 613.

Although the order was erroneous in declaring that the expense of the auditor shall, instead of abiding the result of the action, be paid by one or both of the parties in accordance with the determination of the trial judge, the error does not require that either of the extraordinary remedies applied for here be granted. If the petitioner deems himself prejudiced by the error he may get redress through application to the District Court for a modification of the order; or after final judgment, on writ of error, from the Circuit Court of Appeals. *In re Morrison*, 147 U. S. 14, 26. The petition for writs of mandamus and/ or prohibition is

Denied.

MR. JUSTICE MCKENNA, MR. JUSTICE PITNEY and MR. JUSTICE MCREYNOLDS dissent.